ANIMAL RIGHTS IN A DIVERSE SOCIETY

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This dissertation defends the following thesis: the legal status of non-human animals as property is politically illegitimate. Instead, I argue that humans should be legally understood as guardians over those animals under their tenure. This guardianship relation involves limits on what humans may do to animals, limits which do not currently exist in our society. Most notably, guardians are required to act in the interest of their wards, and so guardians cannot kill or transfer the animals under their tenure unless doing so would be best (or at least good) for the animal. My position broadly fits with, but importantly differs from, much of the recent political philosophy literature focused on animals. I agree that ownership is inappropriate, but argue that considerations of political legitimacy lead us to the guardianship relation rather than full legal personhood. This position falls out of taking seriously the public reason challenge to justice for animals, which appeals to public reason liberalism to argue that the pursuit of justice for animals would be illegitimate. Thus, I examine important debates in public reason liberalism to develop an attractive model of that theory of legitimacy and then apply it to the question of the legal status of animals.
To my father, Steve Bergin

11/21/1950 - 08/13/2007
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INTRODUCTION

Concern for animals is becoming increasingly more mainstream, and is beginning to influence the law in new and more robust ways. States are banning certain confinement methods for agricultural animals as well as permitting concerned citizens to break into cars to free distressed animals. Broadly, there is increasing acceptance of the idea of animal rights and the belief that the government has a role to play in protecting those rights. This is a welcome trend, but it poses an interesting problem in legal and political philosophy: how can it be legitimate for the state to restrict human liberty for the protection of what is, legally speaking, property? Moreover, despite the growth and mainstreaming of the animal rights movement, there are still large swaths of the population who reject the idea of animal rights altogether. And yet these individuals are likely to have their freedom restricted for what they regard as little more than chattel.

This mainstreaming of animal rights, with an increasing focus on legal and political action, is mirrored in the philosophical literature. The past seven years has witnessed what many have called a *Political Turn* in animal ethics. Although there is disagreement about how best to characterize this turn, it is generally accepted that it involves a more explicit focus on political philosophy and political theory, and the application of concepts from those domains to the issue of animal ethics. This is in contrast to the traditional approach to animal ethics which emphasizes individual moral duties. A core focus on this turn is to offer philosophical support for the sorts of animal rights policies being promoted in the larger society. Overall, this has been done by developing theories of *justice* which incorporate animals.
A central aim of this dissertation is to further this political turn in animal rights by focusing on a different concept in liberal political philosophy which has been thus far neglected by turn theorists: legitimacy. Broadly speaking, political legitimacy is concerned with the state or society’s “right to rule”: its permission to make laws or otherwise institute coercive policies. Justice and legitimacy are closely related, but distinct concepts. Classically, justice is concerned with the protection of basic rights and/or the fair distribution of benefits and burdens among citizens, whereas legitimacy is concerned with the free consent of citizens to state action. In the context of the political turn in animal rights, we can say that whereas justice is concerned with what sorts of rights animals have, legitimacy is concerned with what sorts of actions the state may take to protect those rights. For it is commonly accepted that not all actions which promote justice are necessarily legitimate, e.g., significant redistribution of wealth against widespread opposition.

This project is broadly situated in the tradition of public reason liberalism. Public reason liberalism is generally taken to offer the most developed and dominant account of liberal legitimacy for a pluralistic society. As such, it is well placed for evaluating the sorts of animal policies which a liberal society, characterized as most are by significant evaluative diversity, may pursue. Moreover, although public reason liberals have not discussed animal policy in any great detail, when they have they have largely posed a challenge for the legitimacy of animal rights and animal protection policies. Thus, in the face of the political turn’s emphasis on the justice of animal rights, public reason offers a challenge to the permissible adoption of those policies which promote the cause of justice for animals.

My core conclusion is that (at least) one central element of justice for animals - the elimination of their status as property – is legitimate in a diverse society. Indeed, I argue that the
current status of animals as property is illegitimate and so in dire need of reform. This conclusion, then, contributes to the philosophical support for contemporary political movements aimed at protecting animal rights by vindicating the use of coercive state and social power to protect animals.

The dissertation is structured as follows. Chapter I presents what I call the public reason challenge to justice for animals. Here I review and characterize the political turn in animal rights before suggesting how consideration of legitimacy, as understood by public reason liberals, poses a challenge to the entire project of the political turn. I also consider and reject various potential responses to this challenge and discuss the relevance of animal policy to a powerful objection to public reason liberalism, the incompleteness objection.

Chapter II defends what I call the wide asymmetric convergence model of public reason. While there are multiple interpretations of public reason liberalism, I suggest that this interpretation best fits with the underlying motivations for the public reason project as a whole. To do this, I explore various important debates in the public reason literature.

Chapter III responds to one of the most important objections to convergence models of public reason: the anarchy objection. According to this objection, convergence models of public reason set the bar for public justification – the bar for legitimate policy – too high and therefore no policies, or only very few policies, will ever be legitimate.

With the wide asymmetric convergence model of public reason in hand I turn in chapter IV to vindicate a core aspect of justice for animals: the rejection of their status as property. The conclusion that animals should not be regarded as property is not itself new, with arguments being offered in the traditional animal ethics literature as well as the new political turn literature.
However, there have been no arguments presented within the framework of liberal legitimacy. Moreover, in appealing to the public reason framework for liberal legitimacy, I argue that there are certain important limitations to the arguments against the property status of animals. Most notably, many arguments to this effect argue that if animals cannot be regarded as property then they must be regarded as full legal persons. My approach is more nuanced, as I argue that animals should be regarded as wards of humans, and humans as guardians of animals. This guardianship relation is distinct from an ownership relation in important ways, but is not equivalent to the status of a full legal person.
CHAPTER I. THE PUBLIC REASON CHALLENGE TO JUSTICE FOR ANIMALS

The animal ethics literature has always been political in nature: Peter Singer’s *Animal Liberation* called for an end to factory farming; Tom Regan’s *The Case for Animal Rights* advocated legal rights for animals. But over the past 7 years, there has been a concerted effort to leverage insights from political philosophy, especially liberal political philosophy, to reframe the animal ethics debate. This *Political Turn in Animal Ethics* has been defined by explicit interaction with political philosophy, framing of human-animal relations in terms of political justice, and an emphasis on legal remedies to identified problems. Broadly, those I call *Turn Theorists* argue that at least some non-human animals are owed duties of justice, and that the liberal state has a role to play in enforcing these duties. In arguing for a greater role for the state in governing human-animal relations, turn theorists reject the “liberal orthodoxy” that regards such relations as largely a matter of personal morality.¹

While the political focus is a welcome new avenue in animal ethics, turn theorists have thus far only explored one aspect of liberal political philosophy that is relevant to their project. By and large, their focus has been on rejecting the liberal orthodoxy that places animals outside of the realm of justice. Standardly, liberal theorists such as John Rawls have suggested that only human beings are owed duties of justice, and they have tended to elevate justice as a special subset of morality. By excluding animals from justice, liberal theorists have held that the state has little or no role to play in limiting human liberty for the sake of animals. This results from the fundamental liberal commitment to human freedom, and the generally high bar placed on state

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action that restricts it. While expressions of human liberty that harm other humans, for example, may be legally restricted, expressions of human liberty that harm non-human animals may not, at least, not on the basis of the harm to the animals. By rejecting the liberal orthodoxy, and including animals within the realm of justice, turn theorists take it that they have shown that it is permissible for the state to limit human liberty for the sake of animals.

But including animals within the realm of justice is only one half of arguing for state intervention for the sake of animals. Liberal political theory does not merely elevate the relevance of justice considerations, it also emphasizes broad limits on legitimate political action. For many liberals, most notably political or public reason liberals, not all pursuits of justice are necessarily legitimate. For instance, it may not be legitimate to mandate that the highest skilled teachers teach in the least well off schools, even if doing so would make the society more just.² And so an as yet unresolved challenge to the political turn in animal ethics is given by these liberal theories of legitimacy. Turn theorists must not just show that animals are owed duties of justice, they must also show that state action to enforce those duties would be legitimate. And for many liberals, legitimacy is governed by a Principle of Public Justification. On this view, for state action to be permissible it must be justified for all members of society. For many, this means it must be justified by way of public reasons – reasons that are shared by all members of society despite their otherwise broad diversity. This restriction on legitimate state action thus poses what I call the Public Reason Challenge to Justice for Animals. The challenge can be framed in terms of the following question: can state action, in accord with a conception of justice for animals, be publicly justified?

² Example modified from Basl & Schouten. See John Basl and Gina Schouten, “The Inadequacy of Traditional Moral Status Arguments for Abolition of Animal Consumption and Experimentation” n.d.
1. Liberalism and Animals: The Orthodoxy

It is widely held in modern liberal societies such as the United States that one is free to choose to eat animals or not, to wear animal products or not, to own pets or not, or to use products tested on animals or not. Put simply, the standard view among members of liberal societies such as the United States is that human-animal relationships are broadly speaking a matter of individual choice.³ There are some limits enforced by the state, such as anti-cruelty laws that limit what one may do to companion animals such as dogs and cats, protections for endangered species, and restrictions on hunting. But the overarching principle is one of individual choice – while animal activists are free to attempt to persuade others to make different choices, they ought not to introduce laws which force compliance through the threat of punishment.

The standard view among the public is mirrored in liberal political theory. A guiding principle of liberal theory is the recognition and acceptance of moral pluralism.⁴ Liberalism is usually understood to have arisen in Europe (and especially England) in the 18th century as a response to the Protestant Reformation and the resulting religious conflicts between Catholics and Protestants.⁵ Rather than resolving the conflict by allowing whoever was in power to enforce their religious views, liberals such as John Locke argued for religious toleration.⁶ As liberalism developed, religious toleration expanded as it was recognized that there are a variety of moral differences. For instance, John Stuart Mill’s advocacy of liberalism focused on the value of

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individual “experiments in living”. And this general acceptance of moral pluralism – the idea that in a sufficiently free society there will be a diversity of conflicting moral views which should be respected – has been explicitly applied to human-animal relations. While for the most part liberal theorists have said very little specifically about non-human animals, when they have it has largely been to claim that there are a variety of moral views about the proper human-animal relation, and as such a good liberal society will be tolerant of these diverse views.

Importantly, liberal theory does not tolerate all moral views. Liberals have historically excluded certain moral views from the principle of toleration. Whilst defending religious toleration, Locke suggested there was no reason to tolerate Atheists; whilst defending experiments in living, Mill claimed that no one should be permitted to sell herself into slavery or, relatedly, to own other human beings. In contemporary liberal theory, which is commonly associated with John Rawls, acceptance of moral pluralism is restricted to reasonable pluralism.

Like Mill, Rawls suggests that tolerance of diversity must be restricted by a fundamental commitment to the freedom and equality of all people. Owning humans involves denying that freedom and equality, and so it cannot be tolerated. Similarly, for Rawls the freedom and equality of all people generates certain principles of justice – what he called justice as fairness – which then carve out the realm of reasonable pluralism. If a moral view runs afoul of the principles of justice, or the pursuit of one’s projects would violate the principles of justice, then that moral view or those pursuits are unreasonable and need not be tolerated.

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8 See, e.g., Rawls, *Political Liberalism*, 2005, 244.
9 Rawls, 58, 201.
The restriction of pluralism by the principles of justice indicates the important role justice plays in liberal theory. Justice, as a subset of morality, is commonly taken to have greater weight than other moral claims.\textsuperscript{11} For many liberals, as indicated by Rawls’s constraint on pluralism, principles of justice help to define certain “non-negotiables” that help to organize our common life by applying to all of us, regardless of our disparate moral views. Being owed duties of justice imbues one with a special status that being owed mere duties of “charity” or “compassion” do not.\textsuperscript{12} That this is so is both evidenced by and helps to explain why (nearly) all political movements leverage the language of justice to advance their causes.

The orthodox liberal view, then, is that animals are not recipients of justice. Although we may owe duties of compassion or humanity to animals, these moral duties are not duties of justice and so are left in the realm of reasonable pluralism. This is explicit in both Rawls’s and Brian Barry’s treatment of justice, and is generally implied in most liberal political philosophy.\textsuperscript{13} Since it is human beings who are “free and equal,” individuals who must live together according to common norms, it is human beings whose liberty must be respected, but also constrained in accord with the freedom and equality of their fellows. Rawls’s discussion of animals is particularly telling on this matter. On his view, the moral position that non-human animals have intrinsic value is akin to the religious position that fertilized eggs are persons because God imbuies human beings with a soul at conception.\textsuperscript{14} The conclusion Rawls draws from this is that

just as we think it inappropriate to base law on a controversial religious view, we also should not base law on a controversial view about the moral status of animals.

The place of animals and humans in liberal political theory can be further drawn out by considering the issue of ownership. Liberals are (nearly) universally united in their view that the ownership of humans is incompatible with liberal justice. While people are free to engage in a wide variety of experiments in living, and hold a wide variety of moral views, they should not be left free to own human beings. In contrast, liberals are also (nearly) universally united in their view that there is nothing unjust about owning animals. While they usually hold that one must not be cruel to the animals one owns, the ownership itself is unproblematic. Thus, people should be left free to own animals and use them in a wide variety of ways; it is not the place of the state to interfere with such experiments in living because the treatment of animals is simply not a matter of justice.

2. The Political Turn and Justice for Animals

A defining feature of the recent political turn in animal ethics is the rejection of the liberal orthodoxy with respect to animals. Many turn theorists have focused their efforts on defending a theory of liberal justice that incorporates animals. More generally, turn theorists are broadly united in their claim that a liberal state can justifiably govern human-animal relations. This could include coercively limiting human pursuits that harm or violate the rights of animals. Interestingly, parallel to this political turn in the philosophical literature is a political turn in animal activism. The past few years has witnessed an increase use of the law to protect animal interests. This has included bans on certain confinement systems in animal agriculture, such as sow gestation crates. It has also included laws permitting concerned citizens to break into cars to
free distressed companion animals. The liberal orthodoxy on animals is being challenged not just in the philosophical literature, but in the legislatures and courthouses as well.

Some turn theorists have directly engaged with the traditional liberal arguments for placing animals outside the realm of justice. For instance, some have challenged the common claim, rooted in the social contract tradition, that because animals do not contribute to a cooperative social scheme then they are not owed duties of justice. The orthodox liberal idea is that one of our fixed points for theorizing about justice, along with the status of humans as free and equal, is that society is “a fair system of cooperation over time”. By this Rawls and other liberals mean that society is composed of “publicly recognized rules and procedures that those cooperating accept and regard as properly regulating their conduct”. Since animals are incapable of regulating their conduct in accord with these rules, they cannot be fair cooperators who contribute to society. Turn theorists have challenged this position by claiming that animals, specifically domesticated animals, are contributing members of a mixed human-animal society. These theorists, including Mark Coeckelbergh, Sue Donaldson & Will Kymlicka, and Kimberly Smith, tend to downplay the specific understanding of contribution that Rawls has in mind for they do not claim that animals regulate their conduct in relation to publicly recognized rules. Rather, they tend to emphasize the fact that society as we know it depends on the contributions of domesticated animals, largely through their labor. Further, they note that we do

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15 Rawls, 15–21.
16 Rawls, 16.
17 Sometimes this argument is put in terms of animals not having a “sense of justice”. The basic claim is that only beings capable of a sense of justice, meaning capable of regulating their conduct in light of principles of justice, can be claimants of justice. Although these two framings appear distinct, as should be clear from spelling out what it means to be a fair contributor and to have a sense of justice, the arguments are effectively identical.
not place humans who cannot regulate their conduct in accord with publicly recognized rules outside of the realm of justice, and so that requirement cannot be strictly necessary.\textsuperscript{19} One way of understanding this challenge is that the standard liberal view has both a \textit{relational} and an \textit{intrinsic} component. Relationally, the issue is whether animals are cooperators within society; intrinsically, the issue is whether animals have the relevant capacities to accept publicly recognized rules and regulate their behavior in light of those rules. Whereas Rawls and others have emphasized the importance of the intrinsic component, turn theorists emphasize the relational component.

Other turn theorists have rejected the social contract approach to liberal justice entirely. These theorists, including Robert Garner, Alasdair Cochrane, and Jason Wyckoff, broadly equate justice with the principle of equal consideration of interests.\textsuperscript{20} They argue that the current treatment of animals as well as the current legal and political status of animals violates the principle of equal consideration of interests. This principle requires that moral consideration of individuals be based on the individual’s intrinsic characteristics, and the interests that flow from those characteristics.\textsuperscript{21} This contrasts with basing treatment on some sort of group membership, such as species membership. Importantly, the emphasis for these theorists, as made explicit by Wyckoff, is not on individual human treatment of animals. Rather, the issue is that our current socio-political system constructs animals as a class whose interests are systematically disregarded.\textsuperscript{22} The sort of parallel Wyckoff has in mind here is with the social institution of

\textsuperscript{19} Coeckelbergh, “Distributive Justice and Co-Operation in a World of Humans and Non-Humans,” 75; Donaldson and Kymlicka, Zoopolis, 105; But for a criticism of this “argument from marginal cases” see Garner, \textit{A Theory of Justice for Animals}, chap. 9.


\textsuperscript{21} Garner, \textit{A Theory of Justice for Animals}, 98.

\textsuperscript{22} Wyckoff, “Toward Justice for Animals,” 540.
human slavery. While it may have been the case that certain enslaved individuals were treated well – their interests were considered appropriately by those who enslaved them – such peoples were forced into a socio-political class that left them subject to treatment which was “seriously morally wrong”. And so, while this approach relies on a principle which was first developed outside of specifically political considerations, in the hands of the turn theorists it is taken to have decidedly political implications.

Just as there are diverse approaches to incorporating animals into a liberal theory of justice, there is also disagreement about the political implications of justice for animals. Some take justice for animals to require the abolition of all animal use while others emphasize the potential for a just human-animal community. Nonetheless, there is nearly universal agreement among turn theorists that justice for animals is incompatible with the ownership of animals. For Wyckoff, just as the property status of enslaved peoples was unjust even if no particular enslaved person was ever mistreated, the property status of animals is unjust even if no particular animal is ever mistreated. The status of animals as property constructs animals as a class whose interests “simply count for less.” Others emphasize that the status of animals as property negates the possibility of sufficiently protecting their interests or rights in a legal setting. And still others, especially those who emphasize the relational element of liberal justice, suggest that (some)

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23 Wyckoff, 546.
24 Alasdair Cochrane provides the one clear departure from this agreement. However, as will be discussed in detail in Chapter 4, he does reject the sort of ownership that is currently common in liberal societies. see Alasdair Cochrane, “Ownership and Justice for Animals,” *Utilitas* 21, no. 04 (December 2009): 424, https://doi.org/10.1017/S0953820809990203.
animals are co-citizens, and one cannot simultaneously be a co-citizen and a piece of property. For all of these theorists, eliminating the property status of animals is not all there is to justice for animals – that is, it is not sufficient to achieve justice for animals – but it is necessary. So long as animals are regarded as legal property, they suggest, there can be no justice for animals.

In sum, the political turn in animal ethics challenges two central features of the liberal orthodoxy. Theoretically, the turn challenges the orthodox view that animals are not owed justice. Practically, the turn challenges the orthodox view that animals can be owned by humans. I emphasize the ownership issue because it is an issue on which turn theorists find common ground, but also because it represents a core challenge to traditional liberalism. One of the central features of liberalism has been the protection of strong property rights in a wide range of entities, including animals. This is in fact one way to underwrite the common view that human-animal relations are largely a matter of individual choice. For if animals can be owned, then it is the right of the owner to determine how she interacts with her property. We certainly accept this sort of understanding of property rights in other cases, such as the ownership of furniture and real estate. And this is, generally, how the law in liberal societies understands the human-animal relation. While there are some restrictions on how a human owner may treat his animal property, by and large the owner is at liberty to do with his animal property as he sees fit.

3. Political Legitimacy and Public Reason

According to many of the turn theorists, if we can develop a coherent theory of justice that incorporates animals, then we can immediately justify political interventions which aim to protect animals. However, this is too quick, because, as G.A. Cohen has observed, the question “what is justice?” is distinct from the question “what should the state do?” While these two questions are not distinguished as often as they should be, it is a mistake to hold that the state can always permissibly act in the pursuit of justice. The second question – “what should the state do?” – is the question of political legitimacy, and liberal theorists broadly accept that not all policies which advance justice are necessarily legitimate. Consider, for example, a policy mandating that the best teachers teach in the worst schools. Such a policy could further justice, as understood by various egalitarian theories, and while it may be nice for the best teachers to transfer to the worst schools, a state mandate seems to constitute an overstep. So, even if we develop a coherent theory of justice for animals, and work out its political implications, that does not yet tell us that the liberal state should act to advance the cause of justice for animals. For reasons that will become clear later, I call this the Public Reason Challenge to Justice for Animals.

The confusion among turn theorists arises because of a failure to distinguish a political conception of justice from a comprehensive conception (or theory) of justice. A political conception of justice is the subject of an “overlapping consensus” of our diverse moral views, enjoying support in some way from each of them. Put another way, all members of society can find moral reason, within their own evaluative framework, to accept and internalize the political

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conception of justice. This contrasts with a comprehensive conception of justice, which may be rationally defensible and acceptable to some, but inevitably depends for its justification on certain beliefs or values which are not shared among all reasonable members of society. Comprehensive conceptions of justice are not the subject of an overlapping consensus. This distinction suggests that merely developing a conception of justice which incorporates animals is not sufficient to show that the conception ought to regulate society.

The privileged position of a political conception of justice is central to prominent theories of liberal legitimacy, most notably Public Reason (or Political) Liberalism. Liberal theories of legitimacy aim to harmonize the fact that we must live together in accord with common norms and laws with the fact that we reasonably disagree about basic moral matters. To respect all individuals as free and equal, it is argued that political authority must be justified for all, from their own (reasonable) perspective. Since the political conception of justice, for Rawls, is the subject of an overlapping consensus of all reasonable moral views, then the sorts of reasons that emanate from that conception of justice are reasons which all people acknowledge from their own perspective, and, as such, those reasons can be used to justify political authority – they are public reasons. This contrasts with, for example, attempting to justify a law on specific religious grounds. Since not all members of society will share the specific religion, the reasons which that

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29 Technically, in a sufficiently homogenous society, a comprehensive conception of justice could be the subject of an overlapping consensus. This could occur if all (reasonable) members of society happened to accept the same beliefs and values which underwrote that conception of justice.


31 The restriction of justification to “reasonable” perspectives or doctrines or people is a notoriously vexing issue. I set aside a specific discussion of the meaning of this term for now and deal with it in more detail in the following chapter.
religion generates are not reasons which all members of society can acknowledge as applying to them, from their own perspective – they are private reasons. This also contrasts with attempting to justify a law by appeal to a comprehensive conception of justice such as utilitarianism. Utilitarianism is certainly rationally defensible, and it may even be true, but as the history of philosophical ethics indicates, reasonable people can and do reject it. As such, a law which depends for its justification on appeal to the principle of utility would not be justifiable for all.

An initial characterization of the public reason challenge, then, is to claim that a conception of justice that incorporates animals is merely a comprehensive conception of justice, and not a political conception. This is most obvious with the interest-based theories of justice developed by Garner, Cochrane, and Wyckoff. Such views depend for their justification on certain claims about the moral status of animals and their interests. While these claims are rationally defensible, thoughtful people may reject them. This can be seen by the fact that even among animal ethicists there is wide ranging disagreement about the moral status of animals. But the same argument applies to the relational approaches as well; as we saw, liberal theorists like Rawls rejected the claim that animals are contributing members of society and even theorists more sympathetic to animals have accepted this conclusion. According to this challenge, then, a conception of justice for animals is not the subject of an overlapping consensus – it does not generate public reasons which can then be used to justify specific policies. Thus, state action

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32 To be clear, by “private reason” here I only mean they are reasons which follow from certain doctrines which not all people accept. I do not mean the reasons are not intelligible to everyone or cannot be expressed in words. I, as a non-Catholic, can recognize that Catholics have reason to attend Catholic mass every week even while claiming that I do not have any reason to do so.

aimed at furthering the cause of justice for animals is illegitimate because it is not justifiable for all.34

We can develop this public reason challenge more fully in light of more recent approaches in public reason liberalism. Not all public reason liberals subscribe to the view that we can identify a determinate political conception of justice from which we can cull a set of public reasons that justify political action.35 Indeed, even Rawls in his last work seemed to recognize that modern liberal societies are too diverse to be able to establish a single political conception of justice.36 In short, we now recognize that liberal societies are characterized not just by reasonable pluralism about “the good” but also reasonable pluralism about justice or “the right”. Just consider the debate among political philosophers over various conceptions of egalitarianism, or whether justice should fundamentally be about material goods or capacities, or even about distribution at all. Rawls attempted to deal with this justice pluralism by advocating for a “family of reasonable liberal conceptions of justice” from which we could cull public reasons. But others have ceased to give justice a special status in liberal political theory, emphasizing that what fundamentally matters, for questions of legitimacy, is whether everyone has sufficient reason of their own to endorse the political proposal. Such theorists have thus sought a decentralized “overlapping consensus” – over specific laws or social arrangements rather than over general principles of justice.

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34 I use the location “justifiable for all” here, although others prefer “justifiable to all”. I prefer ‘for’ to indicate that the justifiability need not be a matter of actual interpersonal justification or require actual rational uptake. The various positions on justification will be discussed in the next chapter.

35 Gaus, The Order of Public Reason.

36 Rawls’s discussion of what we now call “justice pluralism” can be found in “Public Reason Revisited” which was republished in the revised version of Political Liberalism.
On this understanding of public reason liberalism the challenge to justice for animals amounts to the claim that the sorts of policies that animal advocates are suggesting are not justified for all members of society. For not all members of society accept that animals are morally equal to humans, or have rights, or sufficiently strong interests to override the right of citizens to live their life their own way. For example, it may be held that not all members of society have sufficient reason to support the ascription of legal rights to animals, rights which would sometimes conflict with (among other things) the property rights of humans. In the face of this sort of widespread disagreement, most public reason liberals retreat to certain core ideas – that humans are free and equal, or that our status as co-citizens of a democratic system imply certain shared reasons – which can be used to justify political action. And while these sorts of ideas may work for the sorts of political action most liberal theorists have in mind – broadly the protection of individual rights and perhaps certain basic welfare guarantees – they seem unlikely to be useful in justifying the sorts of animal protections turn theorists have in mind.

In sum, the public reason challenge to justice for animals suggests that there is an intermediate step between identifying animals as recipients of justice and determining what policy prescriptions that produces, on the one hand, and legitimately enacting those policy prescriptions, on the other. The political turn in animal ethics, thus far, has been focused on the first step – establishing animals as recipients of justice and working out the implications – and simply assumed that the answers reached there can legitimately be enacted in society. And so, I suggest, for the political turn to be successful, we must find a way to overcome the public reason challenge – we must show not only that animals are recipients of justice, but that policies which advance the cause of justice for animals can be legitimately imposed on a diverse society in a way that still respects the freedom and equality of all members of society.
4. Responding to the Public Reason Challenge

There are a variety of ways we may respond to the public reason challenge. A few options, which I consider here, involve outright rejecting the challenge by claiming it is based on a false view of liberal legitimacy. Thus, one could avoid the public reason challenge by rejecting public reason liberalism – or at least the version so far discussed – entirely. Here I consider three options: (1) claim, as liberal perfectionists do, that it is legitimate for the state to enact policy in line with the true theory of the good, even if some reject that theory; (2) accept the public reason restriction on state coercion related to the good but suggest that state coercion in pursuit of justice is acceptable; finally, (3) reject a substantive account of legitimacy entirely and argue that policies are legitimate insofar as they result from certain procedures, regardless of their content.

4.1. Liberal Perfectionism and Pursuit of the Good

In the face of reasonable disagreement about the moral status of animals, and more generally over the proper human-animal relationships, an animal advocate could insist that her view on the subject is the correct one and therefore it should be promoted regardless of disagreement. On her view, she has the correct theory of good human-animal relations, and that others disagree, even reasonably, is irrelevant to what the state should do. This approach fits with a classic and deeply compelling view of the role of the state: it should promote the good and flourishing of its citizens; it should encourage people to lead worthwhile lives. On this conception of the role of the state, there are some types of lives, or more specifically some types of pursuits, that are worthwhile and others that are not and it is the role of the state to distinguish between the two and encourage the former while discouraging the latter. What makes state action legitimate, on
this view, is that it successfully promotes the (true) good of its citizens and/or successfully discourages worthless pursuits. For the animal advocate, then, animal protection laws are legitimate insofar as they help to promote worthwhile human-animal relations and/or discourage unworthy relationships.

This *perfectionist* approach to state action has been advocated by a diversity of thinkers, some who promote broadly liberal institutions and others who reject liberalism altogether. Whether liberal institutions fit well with this view of the state largely depends on what is taken to be truly good for humans. If individuality and the developing of one’s capacities defines the human good, as John Stuart Mill claimed, then liberal institutions are justified insofar as they leave open a significant amount of freedom for individual pursuits. If, instead, a flourishing life is one in which one does what one is naturally best at, as Plato would have it, then we may reject liberal institutions for granting too much freedom, allowing people to dabble in pursuits they are not naturally fit for.

We should reject perfectionism for two main reasons: (1) it fails to display proper respect for persons as rational agents; and (2) perfectionist policies are likely to be self-defeating.

A distinctive feature of modern societies is their understanding of persons as rational agents, as individuals capable of reasoning about their actions and then acting on the basis of reasons. Modern perfectionists do not deny this claim, but perfectionist state action nonetheless fails to display proper respect for persons as rational agents.\(^{37}\) This is because perfectionists permit state action even when no citizen accepts the reason for the action. Consider that

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Catholicism, with its emphasis on regular mass attendance, claims to provide an accurate description of the human good. Given this fact, the state mandates weekly attendance at mass for every citizen. The justification, of course, is that attendance is required for one to live a good human life and so the state is only acting to promote the good and flourishing of its citizens. But let us assume no citizen is a believing Catholic, or even a Christian for that matter. These citizens do not believe in an all-powerful God, in any of the stories from the Bible, or any of Catholic dogma. From their perspective, there is absolutely no reason for this obligatory mass requirement. In this sort of situation, it seems as if the state is seeking to impose, against the will of rational citizens, a conception of the good. Whereas attempting to persuade citizens that Catholicism is true may be acceptable, forcing adherence seems disrespectful.

For many it is quite easy to recognize that there is something wrong with mandating certain religious practices, particularly in a religiously diverse society. But what the perfectionist fails to realize is that the very same objection to mandating religious adherence applies to mandating adherence with any conception of the human good. In every case, we are failing to respect persons as rational agents since we are not attempting to engage their reason but rather mandate compliance. And this is true in the case of animal policy as well, if we are to follow the imagined animal advocate in suggesting that her view of human-animal relations is the correct one and therefore the state should promote it regardless of the views of other citizens.

Perfectionist policies, particularly coercive ones, are also likely to be self-defeating.\textsuperscript{38} This is because it is not possible for an activity to improve a person’s life if she does not endorse the value of that activity.\textsuperscript{39} To use the example above, we may suggest that simply attending

\textsuperscript{38} Wall, “Perfectionism in Moral and Political Philosophy.”
mass every Sunday, without any endorsement of the value of such attendance, will fail to help one live a good Catholic life (or afterlife). Similarly, then, we may suggest that whatever value certain human-animal relationships can have for a human life cannot be manifested so long as the humans engaged in the relationship do not recognize it as valuable. And so, even if the perfectionist is correct that the aim of the state should be to encourage worthwhile human lives, this does not support the adoption of coercive state policies when citizens reasonably disagree about the goodness of the relevant pursuits.

4.2. An Asymmetry between Justice and the Good

Rather than claim that animal rights policies will promote the human good, our animal advocate could instead accept that there is reasonable disagreement about the good and that state policies which can only be justified by appeal to some controversial conception of the good are illegitimate. Nonetheless, she could claim that the issue of animal rights, or of human-animal relations generally, is not an issue of good human lives but rather an issue of justice. And while the state should not act to promote certain controversial conceptions of the good, it can certainly act to promote justice. Indeed, our advocate may claim, this is precisely what the state does when it enacts laws against theft and enforces contracts: rather than taking a stand on what sorts of human lives are worth pursuing, it is simply creating a space where everyone may pursue their conceptions of the good, so long as those pursuits do not infringe on others’ pursuits. In the animal case, then, our advocate may suggest that while citizens can have a variety of competing views about the human good, and proper human-animal relations, it is unjust for those pursuits to threaten the livelihoods of the animals themselves.
This approach to legitimacy, generally, holds that there is an important asymmetry between the good, on the one hand, and justice or the right, on the other.\textsuperscript{40} Whereas there is reasonable disagreement about the good, and this places an important restriction on state action, either there is no reasonable disagreement about justice, or the disagreement is of a different type and therefore doesn’t similarly support restrictions on state action that pursue justice. In the hands of someone advocating for justice for animals, the claim would be that insofar as animal protection policies promote the cause of justice, then they are legitimate, even if there is significant disagreement. Although none of the recent work on the political theory of animal rights has discussed legitimacy, their major focus on political justice would seem to suggest that this is most likely the sort of position they would hold.

John Rawls, initially, held to something like this asymmetry position. For on his view, as stated in \textit{Political Liberalism}, although there were many incompatible but reasonable “conceptions of the good” the only conception of justice which was justifiable for all was his \textit{justice as fairness}.\textsuperscript{41} He would later back off this position, inevitably holding that there was a “family” of reasonable conceptions of justice and so there could be reasonable disagreement regarding justice just as there could be reasonable disagreement regarding the good.\textsuperscript{42} More recently, Jonathan Quong has defended the asymmetry position and continued to advocate for a position more in line with Rawls’s initial statement of political liberalism.\textsuperscript{43}

Quong’s defense of the asymmetry between the good and justice does not deny that there is reasonable disagreement about justice. Rather, he suggests that the disagreements about justice

\textsuperscript{42} Rawls, 450.
\textsuperscript{43} Quong, “Disagreement, Asymmetry, and Liberal Legitimacy.”
are of a different sort than the disagreements about the good. Whereas disagreements about the
good are “foundational disagreements,” disagreements about justice are merely “justificatory.”
When reasonable people disagree about the good, they “do not share any premises which can
serve as a mutually acceptable standard of justification” and thus their disagreements are
foundational. In contrast, Quong suggests that when it comes to reasonable disagreement about
justice there is a mutually acceptable standard of justification, and the disagreement is over what
substantive conclusions that agreed standard justifies. Put another way, when citizens disagree
about the good they are disagreeing about fundamental matters – whether God’s will provides
reason for action or not, for instance. But when they disagree about justice, they agree on what
sorts of reasons are relevant – for instance, they may both agree that principles of religious
freedom and equality of opportunity are relevant considerations – but disagree on what policy or
action those reasons (best) support. In the face of justificatory disagreement, Quong suggests, a
fair decision procedure can be sufficient for establishing public justification. But this is not so
for foundational disagreements.

The first question to ask of this approach is whether it would succeed for the animal
advocate. To answer that, we must know whether disagreement about animal rights really are
merely justificatory disagreements or are foundational disagreements. It is one thing to claim that
a disagreement is a disagreement about ‘justice’ rather than ‘the good,’ but it is another for this
to properly map onto Quong’s distinction between justificatory and foundational disagreements.
And the first thing to note here is that it at least appears as though disagreement over animal
policy is likely to be based in foundational disagreements. Consider, for instance, Rawls’s

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44 Quong, 313–14.
45 Quong, 301.
46 Quong, 316–17.
discussion of some citizens appealing to the Christian view that animals are placed on earth for “our use and wont,” while others may appeal to a “natural religion” which rejects both the substantive conclusion that animals are placed on earth for human use and the underlying justification which appeals to Judeo-Christian doctrine. Indeed, it seems that the way Rawls sets up the problem of animal policy is precisely as a foundational disagreement – for he advocates appealing to anthropocentric concerns but notes that some people may wholly reject this anthropocentric approach in favor of something that accords animals concern in their own right. And so, regardless of whether Quong’s general defense of the asymmetry is successful, it does not seem to get a grip with the issue of justice for animals.

We should also reject Quong’s position outright, for it falls prey to a dilemma. Quong’s approach is ambiguous between what Fowler and Stemplowska call a “coarse account” and a “fine account” of justificatory disagreement. On the coarse account, an agreement is merely justificatory so long as the parties share certain basic values, such as a commitment to the value of “(general) freedom and (general) equality.” On the fine account, an agreement is justificatory only if the parties “accept as values all the values offered by fellow citizens with whom they disagree over a given policy; it is not enough if they merely agree on the basic values.” Quong’s argument for the distinction between justificatory and foundational disagreements supports both of these readings, and yet either reading creates issues for Quong’s account.

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49 Fowler and Stemplowska, 137–38.
50 Fowler and Stemplowska, 137.
51 Fowler and Stemplowska, 138.
Adopting the fine account will end up generalizing my objection to the distinction with regard to animal policy. If citizens have to accept all the values being offered for an agreement to be merely justificatory, then there will be some cases of justice disagreement that are justificatory and some (like the animal case) which are foundational. It is simply not true that all cases of justice disagreement involve disagreements where the relevant parties accept all the same values. If this is true, then there is no good reason to treat justice disagreement as distinct from disagreement about the good, at least not in general.

Alternatively, adopting the coarse account raises its own problem. If agreement on certain basic or general values such as freedom and equality (without any real specification) is sufficient to purchase justification, then it is sufficient to transform any disagreement into a justificatory one and allow citizens to rely merely on fair procedures to establish legitimacy. This is because we can imagine everyone accepting that freedom and equality matter; people may disagree about how to specify those values, or to what degree they matter, but if all that is required is that they agree the values matter, then (nearly) all disagreements would be justificatory disagreements. But this would apply no less to disagreement about the good; so long as citizens agree that freedom and equality are valuable, then their disagreement over whether God’s will provides reasons is merely justificatory and can be resolved by democratic procedures. If this is the case, then we have undermined the public reason project entirely. We may have rescued the ability for the state to legitimately act in the pursuit of justice in the face of reasonable disagreement, but we have done so at the expense of justifying liberal perfectionism as well.

Thus, regardless of which horn of the dilemma we take, Quong’s distinction fails to vindicate the asymmetric treatment of justice and the good. So long as we are committed to reasonable disagreement about the good limiting legitimate state action, we must also be
committed to reasonable disagreement about justice limiting legitimate state action. Thus, the public reason challenge to justice for animals remains.

4.3. *Legitimacy is about Procedure*

Some may reject the public reason challenge outright, as depending on a false view of political legitimacy. For public reason liberals, legitimacy is largely a substantive matter. We are interested in whether everyone has reason to endorse a political proposal, and so must investigate the substance of the proposal. But we could also think of legitimacy as a procedural matter. In a democratic society, for instance, we establish certain majoritarian procedures for passing law, and the thought is that any law which passes by way of those procedures is thereby legitimate. Thus, a turn theorist may argue that so long as animal protections are adopted by way of the standard democratic procedures for the society, they will be legitimate. It does not matter if they are justified by appeal to public reasons or if some members of society do not have sufficient reason of their own to endorse the protections.

We should reject this response for two reasons. First, even if procedural legitimacy were sufficient, it is unlikely that the sorts of animal policies promoted by the turn theorists will pass through majoritarian procedures anytime soon. While the legitimacy of some basic welfare protections could potentially be vindicated in this way, there is simply not enough support for the ascription of legal rights to animals or the elimination of their property status. Humans remain deeply attached to all sorts of animal products which, according to turn theorists, would not be available if justice for animals were achieved. And so, advocating for procedural legitimacy would be a hollow victory.
We should also reject democratic procedures as sufficient for establishing legitimacy. Indeed, no modern democracy functions on a purely proceduralist basis. In the United States, the Bill of Rights, along with checks such as judicial review, aim to ensure that the results of even fair procedures are also substantively legitimate. This illustrates that while it may be important that political decisions are made through certain fair processes, we should not accept that any decision made through such a process is thereby legitimate. This is most clear when the procedure is mere majoritarian decision-making and impugns the basic rights of the minority. Consider, for instance, Jim Crow laws in the United States. Such laws were passed through the standard democratic procedures (including adoption into state constitutions), but they were such a significant threat to the basic moral worth of many members of society that we would be hard pressed to label them a legitimate use of political authority.

A defender of a pure proceduralist account of legitimacy may, rightly, respond that their view isn’t that just any (democratic) procedure confers legitimacy, but only fair procedures. So, while the basic idea of the procedures used to pass Jim Crow laws may have been fine – majoritarian decision-making made by elected representatives – such procedures were not actually open to all in a fair manner. The basic contours of the procedure needed to be supplemented by fair access to the political process. Thus, even a pure proceduralist need not be committed to the legitimacy of Jim Crow laws.

This response is correct, as far as it goes. However, the example of Jim Crow laws still points to the larger problem with even fair procedures. Even if everyone is fairly involved in some way – perhaps everyone had fair access to the polls to elect the representatives – that does not prevent a tyranny of the majority. So, put another way, we should reject pure proceduralist accounts because there are at least some important political issues – such as basic civil rights –
which should not be left to the whims of democratic procedures. Fair procedures do not guarantee fair outcomes, and so fair procedures can produce radically unfair outcomes that render the political decisions illegitimate.

Reflection on the relevance of fairness to proceduralist accounts of legitimacy also suggests an additional problem. Pure proceduralism holds that the legitimacy of political decisions has nothing to do with the outcomes of those decisions. Instead, the legitimacy is found in the fact that procedure is fair – everyone had an equal role to play in determining the outcome. But, as David Estlund has argued, there are a good deal of fair decision procedures other than the standard democratic ones commonly appealed to by proceduralists. For instance, flipping a coin is also a fair procedure, and yet proceduralists typically reject such procedures as conferring legitimacy. Proceduralists, then, are left in a bind. Either proceduralism, with its defense of specifically democratic procedures, depends on certain substantive commitments, or it is compatible with non-democratic but otherwise fair procedures. If we take the first horn, then pure proceduralism is no longer pure proceduralism. If we take the second horn, then we are left with the unpalatable conclusion that political decisions can be legitimately made on the basis of a coin flip. Inevitably, Estlund suggests that proceduralists implicitly draw on substantive premises about the goodness of the outcomes of distinctively democratic procedures and, in so doing, are not actually pure proceduralist accounts after all. If this is so, then the debate between these rational proceduralists and public reason liberals is over which substantial matters are relevant, not whether substantive matters are relevant.

Hence, we should reject a pure proceduralist account both because it will be unhelpful in achieving justice for animals and because it is undesirable and unworkable as an account of political legitimacy generally. We can see this, further, by recalling the liberal notion of freedom
and equality. As Jean-Jacques Rousseau announced, “man is born free but everywhere he is in chains”. An account of political legitimacy should help us make sense of this fact – it should help us understand how people who are not naturally under the authority of any other can be brought under a common authority whilst remaining free. A pure proceduralist account does not do this – for it makes possible outcomes which are an obvious affront to the freedom and equality of persons. Appeal to public justification can help us understand this situation, for it suggests that political authority is legitimate when it does not place anyone in chains, but rather reflects everyone’s use of their own reason. Legitimate political authority does not violate the status of anyone as free and equal because legitimate political authority is in an important sense, self-imposed.

5. Animals and the Incompleteness of Public Reason

It should be clear that public justification matters for at least some political issues – mere democratic procedures cannot render just any political matter legitimate. In light of this, one may claim that while procedural legitimacy is not sufficient for all political matters, it is still sufficient for some. This is, in fact, the approach Rawls takes to public reason. On his view, the subject of public justification is limited to “constitutional essentials and matters of basic justice”. Other downstream political matters can be legitimately handled by way of democratic procedures. This includes, for Rawls, animal and environmental policy. On these matters, he suggests, it is acceptable for people to appeal to their private reasons and their comprehensive conceptions of justice to advocate for their preferred policies. And the policies that result from legitimate democratic procedures are themselves legitimate. Of course, as previously noted, it is unlikely that this approach will be of much help when it comes to justice for animals since those
supporting strong animal protection policies are in a significant minority. But, an examination of why Rawls restricts the scope of public reason indicates an additional interaction between animal policy and public reason liberalism. It brings to light the \textit{incompleteness problem} for public reason liberalism.

Rawls’s aim in developing his account of public reason is to show that it is possible for diverse peoples to live together in a shared moral and political order. The alternative he identifies is a mere \textit{modus vivendi} – a society of diverse factions each aiming to gain the upper hand over the others. In a \textit{modus vivendi}, people will agree to live together peaceably in accord with common norms only to the extent that they do not see a way to gain greater power and influence. But as soon as they see the opportunity to defect from the common norms and gain the upper hand, they will act. In a \textit{modus vivendi}, people have no \textit{moral} reason to live in accord with the common norms, they only have prudential or strategic reason to do so. Such a society, Rawls held, may be stable at times, but if so it is only because the balance of power works out that way. Rawls, rather, sought “stability for the right reasons”; the aim was for people to accept and internalize the common norms of their society, identifying them with what they take morality to require of them.

Rawls’s project, then, is both difficult and important. It is important because if we could not establish the possibility of legitimacy in a diverse society then we are left accepting that political society is not terribly different from war. It is difficult because, at least on Rawls’s view, for political power to be legitimate it must be wielded in a way consistent with the reasonable pluralism that characterizes modern society. It must be acceptable to deeply religious citizens and atheist citizens; to strongly committed Kantians and die-hard Utilitarians. And so, in order to gain traction into the problem, Rawls suggests that we aim to establish that the central
matters of society – the constitutional essentials and matters of basic justice – can be settled in accord with public reason. These sorts of issues, he suggests, impact our lives to a greater degree than matters of “mere legislation”, and so the exercise of political power as regards them is of greater urgency.

Rawls’s restriction of public justification to constitutional essentials and matters of basic justice allows him to claim that public reason will be “complete”. This means that we will be able to decide “all, or nearly all” relevant matters purely by appeal to public reasons. This is crucial, since if some essential political issues could not be decided without appeal to private reasons, then those political decisions would be hopelessly illegitimate. Rawls would, therefore, have failed in his attempt to harmonize our status as free and equal persons with the exercise of political authority. The restriction on public justification, then, shrinks the set of political matters which must be decided by appeal to public reason and therefore increases the likelihood that all matters in the remaining set could be so decided.

As previously discussed, for Rawls appeal to the moral status of animals is ruled out of public reason since it is not the subject of an overlapping consensus of reasonable comprehensive doctrines. He does not think this should create a major issue, however, because he does not think that animal (or environmental) policy constitutes a constitutional essential or matter of basic justice. It is instead a matter of mere legislation, and therefore it is acceptable for people to advocate for animal policy by appeal to a conception of justice for animals or a controversial conception of their moral status. Were it to rise to the level of constitutional essential or matter of basic justice, however, then such appeals would be inappropriate.

Rawls is incorrect, however, to assert that animal policy is a matter of mere legislation. For, most centrally, whether animals can be held as property directly relates to the basic liberal
right of private property. And the basic liberal right of private property is a constitutional essential or matter of basic justice. As Rawls suggests, if a matter of mere legislation will impact constitutional essentials or matters of basic justice then it must be considered within the domain of public reason. And so, a central feature of the political turn in animal ethics – questioning the property status of animals – is a matter that must be decided in accord with public reason. We can draw a similar conclusion about many other aspects of justice for animals, insofar as they would plausibly impugn on basic liberal rights of free speech and free exercise of religion.

If (some) animal policy is within the scope of public reason, then it must be decided without recourse to controversial conceptions of the good or justice. Hence, Rawls’s admonition that animal advocates cannot appeal to the claim that animals have inherent worth or moral rights. Instead, animal policy decisions, he claims, must be made on the basis of various anthropocentric values such as the health benefits of biodiversity or the aesthetic value of the environment. And while these sorts of considerations may support some animal protection policies, it is unlikely they will support all. For instance, health benefits and aesthetic value do not seem to count in favor of ascribing animals legal rights to eliminating their status as property. Furthermore, even when such considerations do count in favor of some animal protection, they must still be weighed against other anthropocentric concerns, and are likely to lose out. Consider a conflict between those who want to repopulate areas of the U.S. with wolves and ranchers who oppose the reintroduction of predators who threaten their financial livelihoods. Even though biodiversity considerations may count in favor of reintroducing wolves, economic considerations are likely to outweigh, especially since biodiversity only matters insofar as it may impact humans. It would seem that very little by way of animal protection can be justified by appeal to public reasons.
Rawls and others suggest that animal advocates cannot appeal to their controversial moral view about animals. Importantly, if we take this claim seriously, I believe it poses a deep problem for public reason liberalism. Consider: If a moral view which regards all animals – human and non-human – as inherently valuable is controversial because not all members of society hold that animals are inherently valuable, then isn’t a moral view which denies the moral value of animals also objectionably controversial? Rawls even suggests in his brief discussion of animal policy that there are members of society who reject anthropocentric moral thinking. Just as some religious members of society may subscribe to a view on which animals are placed on Earth for human’s “use and wont”, some members of society – those adhering to a “natural religion” view as Rawls calls it – subscribe to a view on which animals are not placed on Earth for human use and that instead, their own inherent worth or value must be respected, even when this limits human pursuits. In the face of this reasonable disagreement, it would seem that the anthropocentric considerations do not constitute public reasons either.

When it comes to animal policy, then, Rawlsian public reason is incomplete. We cannot appeal purely to public reasons to decide the matter. This is because any view we take on the issue requires, first, accepting or denying that animals have a value independent of their value to humans. And on this question there is no shared standard. As David Reidy has argued, public reason is incomplete when it comes to animal policy because before we can even start to discuss the issue in public reason terms we must “resolve a crucial preliminary or background issue with respect to which public reason is silent or inconclusive”.52 This suggests, then, that any political

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decision made with regard to animals will be illegitimate, not just those that appeal to a conception of justice for animals.

Thus, public reason does not just pose a challenge to justice for animals. Justice for animals also poses a challenge for public reason. It thus becomes essential to both programs to investigate whether these challenges can be overcome. If key policy implications of justice for animals cannot possibly be publicly justified, then that is a major blow to both liberalism and the political turn in animal ethics. Additionally, if public reason cannot somehow overcome its incompleteness with regard to animal policy, then we are inevitably left with the conclusion that the most we can ever hope for, when it comes to animal policy in a diverse society, is a mere modus vivendi.

6. Conclusion

The recent political turn in animal ethics challenges the liberal orthodoxy that human relations with animals are largely a matter of personal choice. These turn theorists argue that animals are owed justice, and that a liberal democratic society should work to protect animals even when doing so restricts human liberty. So far, the political turn has focused on developing conceptions of liberal justice which incorporate animals, but this is not sufficient to show that liberal states should in fact work to protect animals. The pursuit of justice, or any other political pursuit, must be regulated by a theory of legitimacy. Public reason liberalism is a compelling theory of liberal legitimacy, yet it seems to challenge the possibility of moving from a philosophical conception of justice for animals to actually legitimately achieving justice for animals.
Theories of political legitimacy are theories that explain under what conditions the state may justifiably interfere with the free actions of citizens. In liberal political theory, theories of public reason or public justification stand out as among the most popular accounts of legitimacy.\textsuperscript{53} Such theories hold that state action must be justified for all people in society by appeal to their reasons. They are an outgrowth of the social contract theory in that they preserve the insight that legitimate social and legal coercion is somehow dependent upon its acceptance by those people who are coerced.\textsuperscript{54} However, public reason views eschew any appeal to actual, tacit, or hypothetical consent. Instead, what binds all modern theories of public reason is a commitment to the Principle of Public Justification (PPJ), which holds, generally, that:

A coercive social arrangement $S$ is justified in a public $P$ if and only if each member $i$ of $P$ has sufficient reason(s) $R_i$ to endorse $S$.\textsuperscript{55}

A general motivation for the PPJ is the acceptance, found first in the social contract theorists, that all persons are “free and equal”.\textsuperscript{56} They are free in that they are not naturally under

\textsuperscript{53} There is some disagreement over the relationship between “public reason” and “public justification”. In short, some suggest that “public reason” views must by necessity include an element of public reasoning where the reasons for state action are discussed in certain terms in the public sphere and/or the issues are deliberated among the public. On this understanding, public reason is a species or sub-set of public justification. However, others have argued that there is no necessary tie between public reason in general and public reasoning in particular. On this view, public reason and public justification largely amount to the same thing. Without taking a stand on this debate, I will be using the terms interchangeably. For more on the connection see, e.g., Kevin Vallier and Fred D’Agostino, “Public Justification,” ed. Edward Zalta, Stanford Encyclopedia of Philosophy, Spring 2014, http://plato.stanford.edu/archives/spr2014/entries/justification-public/.


\textsuperscript{55} This is a slightly modified version of the principle given by Kevin Vallier and Fred D’Agostino. See Vallier and D’Agostino, “Public Justification.” It should be noted that the PPJ is a necessary, but not sufficient, condition of legitimacy. Some sort of procedural legitimacy – that the arrangement was adopted in the right sort of way – may also be necessary.

the political authority of any other person and they are equal in respect to this freedom from authority. From this starting point, the question that drives the social contract theorists is how can free and equal persons be subjected to social and political authority. The answer public reason views give is that such authority is legitimate if and only if it can be freely endorsed by all persons under it.

There are a variety of competing models of public reason. While each is committed to the PPJ in general, the competing models interpret the variables found in the PPJ in different ways. In this paper, I defend what I call the Wide Asymmetric Convergence Model of Public Reason. This is a wide model of public reason because the scope of public justification – the sorts of coercive social arrangements that stand in need of public justification – is expansive. It includes all coercive state action, but also coercive social arrangements not implemented by the state. In this way, my model expands public justification from a purely political issue to a social issue. While this wide view is not completely original to the existing literature, it has not received significant attention or defense against models that limit public justification to only state action.

The further elements of the model I defend, which are interpretations of variables $P$ (which includes $i$) and $R$, make it an asymmetric convergence model. In brief, interpreting $P$ involves determining the constituency of public justification – who coercive social arrangements are to be justified for, and how we are to understand the belief-value sets and motivational composition of these “members of the public”. The central debate on this question is over how,

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57 Despite the linguistic affinity, my “wide view” should not be confused with Rawls’s “wide view of public reason”. Rawls’s wide view has to do with restrictions on public reasoning, not the scope of public justification.

58 See, for instance, Gaus, The Order of Public Reason.

59 Following Gaus, I use the phrase “members of the public” to refer to the idealized set of individuals in society. As such, any reference to members of the public should be understood to include idealization, as discussed below (§2).
if at all, to idealize individuals in order to uncover their reasons and identify which rise to the level of sufficient reasons. Asymmetric convergence models of public justification are united in their defense of a moderate form of idealization, as opposed to not idealizing at all, on the one hand, or significantly idealizing, on the other.\textsuperscript{60}

Finally, every model of public justification must include a conception of justificatory reasons: what sorts of reasons are relevant in evaluating coercive social arrangements, and whether there must be a consensus or convergence of reasons to justify an arrangement. Commonly, this debate is over whether or not religious, or other non-shared reasons, should play a role in determining whether a coercive social arrangement is justified.\textsuperscript{61} The asymmetric convergence view I defend here permits a convergence of distinct, potentially non-shared reasons to justify coercive social arrangements; it also permits non-shared reasons to function to deny the legitimacy of a coercive social arrangement.

The wide asymmetric convergence model of public justification I am defending, thus, has three key features:

(1) Scope: Both State and (at least some) non-State coercive social arrangements stand in need of public justification;

(2) Constituency: To determine what reasons people have, we moderately idealize their information set, reasoning abilities, and motivations; and

(3) Justificatory Reasons: Both shared and non-shared reasons are relevant to determining whether an individual has sufficient reason to endorse an arrangement.

\textsuperscript{60} Kevin Vallier, \textit{Liberal Politics and Public Faith: Beyond Separation} (New York: Routledge, 2014); Gaus, \textit{The Order of Public Reason}.

Before moving to my defense of this model, it is worthwhile to clarify the relationship between contemporary theories of public justification and classic social contract views. In particular, the important evolution that took place between social contract views and modern theories of public justification is the elimination of the need for consent of any sort to establish the legitimacy of coercive social arrangements. Social contract theories are notoriously plagued by issues relating to their reliance on consent of some form, so it is important to see how theories of public justification differ.

According to standard social contract views, the actual, tacit, or hypothetical consent of citizens is required for laws or the state to be legitimate. The public justification approach to legitimacy does not rely on actual people actually endorsing the coercive social arrangements they live under; nor does it suggest that because people reap the benefits of those arrangements or have failed to attempt to leave the arrangements that they thereby indicate their endorsement. In these ways, theories of public justification do not rely on actual or tacit consent. But such theories also do not rely on hypothetical consent. On hypothetical consent views, a coercive social arrangement is justified if and only if idealized agents placed within an idealized choice situation would consent to be governed by such arrangements. While theories of public justification, as I will discuss below, do tend to deploy various forms of idealization,

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63 A thorough-going “populist” account of public justification may actually require actual endorsement. However, as far as I know, no one defends such a view (this will be discussed more in §2.2). Relatedly, we may draw a distinction between endorsement and consent, so that even if a theory of public justification appealed to actual people, it would not require their consent but only their endorsement.

this is not done in the context of constructing an idealized choice situation.\textsuperscript{65} Instead, the aim is to uncover what reasons actual people are committed to given their belief-value set. Furthermore, idealization is not essential to theories of public justification – it is possible to construct a model which appeals to the reasons actual people actually claim to have. Whether the particular model includes idealization or not, there is no appeal to agents deliberating amongst each other and then consenting to the coercive social arrangements. Although some hypothetical consent theorists argue that their models do illuminate the reasons we in fact have, the public justification theorist suggests that we do not need the entire consent apparatus to do that.\textsuperscript{66} In this way, theories of public justification are an important evolution of the classic social contract theory.

1. The Scope of Public Justification

Public reason liberals standardly claim that exercises of political power must be justified for all those subject to it, by reasons they can accept. The emphasis on exercises of political power is a result of the connection between coercion and the status of individuals as free and equal. Public reason theorists hold that the status of individuals as free and equal produces a presumption against coercion, as coercion involves the exercise of authority over another. And, as John Rawls suggests, “political power is always coercive power.”\textsuperscript{67} Charles Larmore suggests that it is within the political realm that “the possibility of coercion is involved,” and thus we express our respect

\textsuperscript{65} Of note here is Rawls’s “Original Position” deliberative model, which is a part of his model of public reason. That deliberative model is a hypothetical choice model, but Rawls also argues its aim is not to identify what we would consent to, but rather what reasons “you and me” have. Further, the Original Position is only one step in Rawls’s model; later stages in the justificatory process are evidently not forms of hypothetical consent. See Rawls, \textit{Political Liberalism}, 2005, 22–28.


\textsuperscript{67} Rawls, \textit{Political Liberalism}, 2005, 68.
for one another as free and equal, in that realm, through public justification.⁶⁸ The standard focus of public reason liberals, then, is on coercive state action, as when Jonathan Quong suggests that public justification concerns the imposition of coercive laws.⁶⁹

It is certainly true that state action is (almost) always coercive action. But state action is not the only form of coercive action, and it is especially not the only form of widespread coercive power that we regularly find ourselves subject to. What is important to recognize here is that although public reason theorists have traditionally focused on coercive state action, their underlying motivation is that it is coercion that must be justified in order to properly respect a person as free and equal. As Christopher Eberle notes, “the clarion call of justificatory [or public reason] liberalism is the public justification of coercion.”⁷⁰ Thus, at bottom, it is coercive power, not merely state power, that stands in need of justification. The scope of public justification, then, must be wide; it must encompass not only coercive state action but also coercive social arrangements that are not implemented or enforced by the state. This wide view can be further supported by three observations: (1) non-state coercion, or what John Stuart Mill called “social tyranny,” can be just as oppressive as state coercion; (2) state coercion almost always overlaps with social coercion, and so we cannot fully separate the two and only focus on state coercion; and (3) that state coercion is sometimes an important corrective for non-state coercion, and we cannot make sense of that idea unless we adopt the wide view of public justification.

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1.1. Social Tyranny and Non-State Coercion

The very same reasons that support the public justification of state coercion apply to social coercion as well. Both John Rawls and John Stuart Mill recognized this, in their own ways. For as Mill famously argued, the forum of public opinion, which may be exercised by the majority, can represent a “social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating more deeply into the details of life, and enslaving the soul itself.”\(^{71}\) This is both an explicit recognition of the potentially oppressive nature of social coercion, and also an indication of why coercion, whether by the state or society, stands in need of justification. For it is the fact that social coercion, just as much as state coercion, can deeply influence an individual’s ability to pursue her own life plans that suggest it stands in need of justification. It is because individuals are free and equal, and therefore, by default, permitted to pursue their own lives in their own way, that there is a presumption against coercion – a presumption against interference with that pursuit. And so whether the coercion is enacted by the state or by the society at large is not itself directly relevant to whether it stands in need of justification; rather, it stands in need of justification because it interferes with individual life plans.

Rawls too identified the penetrating nature of political, but also other non-state, institutions as the reason that they stand in need of justification. For as he suggests, “the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are. The social structure also limits people’s ambitions and hopes in different ways.”\(^{72}\) This explains why Rawls makes “the basic structure of

\(^{71}\) On Liberty 1.5 in Mill, *Collected Works of John Stuart Mill.*

society” the subject of justice, and not merely the exercise of legislative or other obviously state-based power. When he suggests that “political power is coercive power”, he does not have in mind only exercises of power by the state. For Rawls, the “political” is shorthand for “political, social, and economic institutions” which make up the basic structure of society.

In sum, the reason that state coercion stands in need of justification is because of its deep and wide-ranging influence on the ability of individuals to pursue their own life plans. Social coercion, or at least many instances of it, also have this deep influence. Moreover, both state and social coercion involve claiming authority over another free and equal person. They also both present threats of punishment, although the type of punishment is often different. In the case of the state, punishment may include things like jail time or fines but in the case of social coercion the punishment is often something more like ostracism or shaming. While in sense we may suggest that state punishment is much worse, as Mill observes, the social tyranny can actually impact us even more deeply. Insofar as this is the case, social coercion too stands in need of justification.

1.2. The State and Social Overlap

A further reason for expanding the scope of public justification beyond state coercion is that there is significant overlap between state coercion and social coercion. Often, it is not possible to isolate state coercion and treat it as wholly distinct from social coercion. Therefore, it is not wholly possible to distinguish state and social coercion and only apply the principle of public justification to the former. Rawls recognizes this when he indicates that “the basic structure of

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74 Rawls, 11.
society” to which he applied his principle of public justification included political, social, and economic institutions as well as “how they fit together into one unified system of social cooperation from one generation to the next.”75 We can also see this when we consider a few common issues that all public reason liberals believe are within the scope of public justification.

First, prohibitions on murder are an obvious example of overlapping coercion: while there is explicit legislation prohibiting murder, there are also common law principles which predate a genuine state and still exert influence over and above explicit legislation. For instance, the common law principle that no person should profit from her own iniquity was used in an 1889 decision to deny a man his inheritance, granted by legal will, because he had murdered the grandfather who bequeathed him the inheritance.76 There was no explicit legislation nullifying a will under such circumstances, and indeed there was explicit legislation forbidding the nullification of a faithfully executed will, and yet the common law principle won the day.77 Importantly, while the courts themselves are technically an apparatus of the state, what is important here is that the sorts of requirements they sometimes enforce are the product of social evolutionary factors, not the sort of explicit state action that some public reason liberals would restrict public justification to.78 This is also evident in the justification given for The Nuremberg Trials, which partly involved holding people accountable for moral norms which were not codified in law at the time of the actions. Thus, if state prohibitions on murder stand in need of

75 Rawls, 11.
76 Riggs v. Palmer (1889)
77 Dworkin Law’s Empire and Taking Rights Seriously both discuss this case.
78 John Hasnas discusses how the common law and common law principles such as the one discussed here are best understood as the products of a social evolutionary process. John Hasnas, “Is There a Moral Duty to Obey the Law?,” Social Philosophy and Policy 30, no. 1–2 (January 2013): 450–79, https://doi.org/10.1017/S0265052513000216.
public justification, then so do the legal principles which are used to make specific judgments in cases, and those principles are not state established.

Additionally, murderers are subject to resentment and indignation: we believe they should feel guilty for what they have done, and we often punish them through social means beyond the purview of the law. In these cases, independent of the state, we are suggesting that they “should have known better”, that they had reason to comply with social norms regarding the treatment of other people. Thus, we are implicitly assuming that such norms are justified for them. Indeed, as Gaus has argued, the whole enterprise of social morality assumes a principle of public justification. For we do not hold people morally accountable for actions where we genuinely believe they could not have known better, either because of a lack of agency on their part (for instance, they are a minor) or because of a non-culpable ignorance. And so, when it comes to even the most obvious cases of state coercion, there is significant overlap with non-state features.

This state-social overlap is also present with our most basic rights, often enshrined in explicit constitutions. While all public reason liberals would agree that an explicit constitution must be publicly justified, it is important to realize that it is not the written constitution, enshrined in law that really stands in need of justification, but rather the coercive rights and powers that such a document grants. And these rights and powers may be granted, as they were for some time in Great Britain, without any explicit state action. Insofar as “constitutional essentials”, as Rawls called them, stand in need of justification, then, we must go beyond mere state coercion.

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79 Gaus, The Order of Public Reason, 23.
This point about basic rights can be further illustrated by considering that many of those rights, such as the right to private property, predate the existence of the state. Moreover, there are socio-moral and common law norms regarding private property rights which differ from explicit legislative requirements. In the United States, for instance, animal anti-cruelty laws forbid (some) animal “owners” from engaging in certain behavior toward their animal property. This is a restriction on a person’s rights with regard to her private property. But enforcement of such laws generally relies on other individuals making the cruelty “their business” and thus contacting the authorities. They are, by force of legislation, authorized to do this. However, in many places, the social norm is that what an “owner” does with her animal is “none of my business” and reporting such cruelty is actually subject to social sanction. In such a case, the socio-moral norms governing property are in fact stronger than the legislative norms. Rights of free speech may be similar; although the constitutionally protected right to free speech is simply a right of citizens against the government, many common citizens appeal to a right of free speech to defend why fellow citizens cannot stop their speech or why they will not stop someone else’s speech. Here, again, we have a socio-moral norm that extends beyond the legislative norm. Insofar as we agree that the legislative norm stands in need of public justification, then we should also hold that the socio-moral norm stands in need of public justification. It is not, 

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80 Here I do not mean to claim that such rights are “natural rights” (although I am also not denying that possibility). Rather, my claim is that many basic rights were recognized by members of society as binding on them independently of any State enforcement. For more on the independent evolution of property norms, see Ryan Bubb, “The Evolution of Property Rights: State Law or Informal Norms?,” *Journal of Law and Economics* 56, no. 3 (2013): 555–594.

81 The actions and practices that are “everybody’s business” constitute the scope of social morality, according to Gerald Gaus. Those actions which we determine to be “none of our business” thus lie outside the scope of praise and blame, and are the sorts of actions which we also tend to think should not be legislated against. See Gaus, *The Order of Public Reason*, 187–91.

82 Consider, too, a similar interaction between the law governing parent-child relationships and the social norms regarding making a parent-child interaction “my business”.

importantly, who enforces the norm that matters; rather, it is that the norm is coercive. And it is not only the state that is coercive.

1.3. Social Tyranny and Corrective State Action

For all I have said above in favor of expanding the scope of public justification, assume, for the sake of argument, that only state action stands in need of public justification. Now imagine we find ourselves in a society (very much like our own) which includes a great deal of non-state authorized discrimination of people based on race, religion, sex, and gender. People are denied employment merely because they are black, or they are paid less merely because they are female. Many of us would, rightly, call on the state to act against this social discrimination. Yet, for the state to enact anti-discrimination legislation is for it to create a new coercive social arrangement. On the view we are assuming, this new coercive social arrangement stands in need of justification.

Now, it may be simple enough to make a case for anti-discrimination laws in the scenario just described. But, notice that there is immediately a presumption against the anti-discrimination laws, insofar as the laws are an instance of state coercion and there is always a presumption against state coercion. But in the scenario just described, a presumption against anti-discrimination laws is a presumption in favor of a discriminatory social arrangement. The suggestion is that whereas the discrimination that many people in the society are experiencing is presumptively justified, laws which would forbid it are presumptively unjustified. Assuming that only state coercion stands in need of public justification seems to rig the game in favor of dominant social groups, allowing for the very social tyranny Mill warned against.
Socially enforced discrimination is coercive.\textsuperscript{83} It can significantly restrict the life prospects of various citizens, and seems quite obviously to fail to regard many citizens as free and equal. If we follow Mill (and as I have suggested, Rawls) and place such social discrimination within the purview of public justification, then we get a better view of the relationship between discriminatory social arrangements and anti-discrimination laws. In particular, we can evaluate the coercive social arrangements as themselves unjustified – for surely those being discriminated against do not have sufficient reason to endorse them. But, further, we can evaluate the anti-discrimination laws, depending on how they are crafted, as either coercion-neutral or net-coercion reducing. This is because the laws themselves, while having coercive components, would presumably correct for the unjustified coercion already present in the society. Of course the details will matter here, and not just any anti-discrimination legislation would be acceptable. The central point is that this sort of explanation of the role and effect of anti-discrimination laws fits better with our intuitive understanding of the laws.

I thus conclude that the scope of public justification should be wide: it should include coercive social arrangements enacted and enforced by the state, as all public reason theorists agree, as well as coercive social arrangements that become established in a society in other ways and are enforced by non-state methods, such as social sanction and the moral emotions. Some may worry that this expands the scope of public justification too far – that some instances of merely social coercion, while coercive, are minimally so, and to suggest such norms must be publicly justified is to place too great of a burden on our interactions with each other.

\textsuperscript{83} While I think this claim is largely non-controversial, Colin Bird defends it in detail. See Bird, “Coercion and Public Justification.”
Two points can assuage these concerns. First, many of those who have these worries are conflating public justification with *publicly justifying*. The former is a status coercive social arrangements must meet to be truly legitimate – they must have the status of being publicly justified; the latter is an interpersonal action – it involves justifying one’s actions to her fellows. But a coercive social arrangement may be publicly justified, and so a person acting in accord with it may be acting permissibly, without her specifically offering, or being able to offer, the justification for the norm on demand. This is, in large part, because as I will argue later, there will often be a convergence of justifications for a norm, and so there is no single justification to offer. What justifies the norm for one person may not justify it for another, but what will matter is that the norm is justified for all members of the public in some way. Certainly, if any given citizen must offer justification on demand, that would be too great of a burden, but that does not clearly follow from anything I have said.

Second, I will offer a bit of a concession. For all that I have or will say, I do not need it to be the case that *every* coercive social arrangement stands in need of public justification. While I do endorse the stronger claim, for my purposes a weaker claim is sufficient: at least some non-state enacted coercive social arrangements stand in need of public justification. This claim seems to fit most directly with Mill’s insight regarding *why* social morality can be so troubling. It is because it can *sometimes* penetrate deeply into our lives, significantly reducing our life prospects in various ways. It is precisely the coercive social arrangements that have this deep effect which most stand in need of public justification. Indeed, it is generally accepted that those social arrangements which are more coercive stand in need of greater justification anyway. And, so, we may hold that at some unspecified threshold of influence on our lives, public justification is largely irrelevant even if the norm is still (minimally) coercive. This could easily mean the
justification is easy to come by, or that it doesn’t need justification. Practically speaking, the results are probably the same.

1.4. Individuating Coercive Social Arrangements

A further issue regarding the scope of public justification is how we are to individuate coercive social arrangements. Rawls, for instance, claimed that we are interested in the public justification of “constitutional essentials and matters of basic justice”; mere legislative matters did not stand in need of public justification. Others, including Jonathan Quong and Kevin Vallier, focus on “laws” but do not specify how precisely we individuate laws. This can be problematic in the case of omnibus bills which cover a variety of unrelated topics; they are, by definition, “proposed laws”. However, we may reasonably worry that such a situation allows for a variety of otherwise unjustified coercive social arrangements to become justified, simply because they ride along with other arrangements which are publicly justified.

There has been important social and psychological research indicating that humans do better when considering more determinate issues: rules, instead of principles for instance. Additionally, as Gerald Gaus has argued, for all the processes of public justification and social morality to function, the “unit of justification” needs to be quite determinate. As such, I suggest that we generally want to consider issues at a “fine-grained” level – general rules rather than

85 Quong, Liberalism without Perfection, 2011; Vallier, Liberal Politics and Public Faith.
abstract principles. For instance, as I will discuss in chapter 4, we should not consider “property rights in animals” as a singular coercive arrangement, but rather as a nexus of various coercive social arrangements including, for instance, the “right to exclude” others from the animal and the “right to destroy or modify” the animal. However, I should also note here that sometimes our reasons in favor or against a given coercive social arrangement will vary depending on the presence or absence of other coercive social arrangements. In this way, some issue exhibit “justificatory dependence”: the social ranking of various proposals regarding the issue varies if some members of the public consider the issue in light of some other issue. For instance, the acceptance of certain types or degrees of taxation may depend, for at least some people, on the presence of functional social welfare system; some members of the public may be much more willing to permit increased taxes if there is such a system, and so what options are socially eligible – those which every member of the public has sufficient reason to endorse – may vary depending on the presence of a strong social welfare system.

It is not the case that there need be a “fact of the matter” whether one issue depends on another: whether an issue exhibits justificatory dependence in relation to another is a matter of how individual members of the public consider the issue. Thus, one member of the public may identify justificatory dependence where another does not. Of course, it is possible for someone to be incorrect about the presence of absence of a dependence, but here what is relevant is whether the individual would be justified in believing there is or is not a dependence after moderate idealization (discussed in detail below). As such, the issue of individuation is admittedly a bit loose. In any given case, there will be open questions about the interactions between various

88 Gaus refers to these sorts of “social rules” as “middle-level social-moral objections”. They are not so specific as to be useless in the face of “unforeseen future circumstances” but also not abstract enough so as to make it nearly impossible for us to share a “common understanding of what the rule requires”. Gaus, 112–13.
89 Gaus, 495.
norms, rules and laws. But, one of the great discoveries of liberal political theory generally, and public reason in particular, is that in the face of a problem rife with disagreement (as there certainly is about the interaction of various issues) we do not necessarily need a centralized solution. Instead, we can incorporate that disagreement into the model as well. So, in what follows, there will be times where I discuss issues in isolation that others may think should be grouped together; and other times I will explicitly argue that there is a justificatory dependence and so we should consider certain issues together. I aim, in every case, to justify why we ought to view it in the way I do; and perhaps even if we view it the other way it will make little difference. But, in those cases where it may make a significant difference, then in those cases I readily admit my argument hinges on contestable ground.

2. The Constituency of Public Reason

In order to determine whether all members of the public have sufficient reason to endorse a coercive social arrangement, we need to know who the members of the public are, and how we are to go about understanding what reasons they have. This is the question of the constituency of public reason. The issue of constituency is fundamentally an issue of idealization: in what ways, and to what degree, should we idealize individuals when trying to determine what reasons they have.

At one extreme we can take people exactly as they are; we determine what reasons they have simply by asking them. This approach, which we can call populism, is motivated by our focus on the fact of evaluative diversity. If our goal is to harmonize common social authority with the presence of evaluative diversity, then we must take that diversity seriously. Populism, by maintaining the evaluative diversity in full, appears to provide the best means of resolving the core liberal problem of exercising authority over free and equal persons.
At another extreme we may idealize people across a variety of reasoning, informational, and moral dimensions so that the reasons we ascribe are the result of perfect reasoning, with perfect information, by morally perfect people. This approach, which we can call *radical idealization*, is motivated by a desire to establish the legitimacy of common social norms as well as a recognition that actual people are often plagued by various prejudices and biases which we may believe are irrelevant to public justification. Radical idealization, in contrast to populism, holds greater hope of vindicating the liberal state. It does this at the cost of decreasing evaluative diversity, but suggests the cleaning up of individual reasoning displays a form of respect for them as rational agents. Asymmetric convergence models of public reason, like the one I defend here, reject both of these extremes in favor of what we can call *moderate idealization*.

Idealization can take place across three dimensions: information, reasoning ability, and motivations. The first two dimensions are often grouped together as defining a person as “rational”, and each can be understood as lying on a continuum. People can have more or less information, and be better or worse reasoners. The motivation dimension is often understood to define a person as “reasonable” by attributing to her motivations, such as a motivation to cooperate, that we may colloquially suggest are “reasonable” motivations for people to have, but which not all actual people have or which aren’t sufficiently motivating in some cases. Since the motivation dimension often involves ascribing, or not, various motivations to people, it is not as clearly a continuum concept and so various approaches to motivation idealization cannot be easily placed on a continuum. In what follows, I will first focus on defending a particular theory of information and reasoning idealization, before later turning to the question of motivation.
2.1. Idealization and the Goal of Public Justification

Recall that the aim of public reason theories is to harmonize the status of individuals as free and equal with the exercise of common social authority. The central conflict public reason liberalism aims to resolve, then, is the conflict between individual diversity and a common social life. This provides two considerations that are central in working through competing theories of idealization. On the one hand, the commitment to individual diversity encourages taking seriously what Rawls calls “The Fact of Reasonable Pluralism”. On the other hand, the commitment to a common social life encourages taking seriously the widespread intuition that at least some coercive social arrangements are legitimate. Call these the diversity and the social motivations, respectively. These two motivations tend to pull us in different directions when it comes to establishing a theory of idealization, but both are important to the overall view. And so, I suggest that we should adopt the theory of idealization which best does justice to these competing motivations.

The diversity motivation encompasses a few key elements of public reason views. Most centrally, it is a recognition that the fact of reasonable pluralism is what gives rise to the need for public justification. If everyone were to agree, or if all disagreements were to be “unreasonable”, then it wouldn’t be clear that public justification was a requirement of legitimate coercion.90 But also recall that the need for public justification arises, once we have evaluative diversity, because of the moral demand to respect all persons as free and equal.91 Thus, the diversity motivation

90 What divides the “reasonable” from the “unreasonable” is a difficult issue related, most prominently, to Rawls’s public reason view. However, I use the term here loosely only to indicate that there is probably some division between reasonable and unreasonable disagreements. Nothing hangs on a substantive understanding of the concept.
91 The moral demand to respect all persons as free and equal need not be a realist, objective moral demand. Rawls suggests it falls out of our status as citizens in a society, while Gaus argues that it falls out of various practices we all engage in. But some public reason liberals, most notably Charles Larmore, have defended the moral demand as a universal realist precept. See Charles Larmore, “The Moral Basis of Political Liberalism,” The Journal of Philosophy 96, no. 12 (1999): 599–625; Rawls, Political Liberalism, 2005, 29–35; Gaus, The Order of Public Reason, 14–23.
also encompasses this commitment to freedom and equality, and to public justification as a means of respecting this freedom and equality. Put simply, the diversity motivation tells us that our aim is to identify coercive social arrangements which are justified for people with a diversity of value commitments, and so our theory of idealization must still account for this diversity.

The social motivation is rooted in the common sense idea that at least some of the central coercive social institutions that structure our common social lives are legitimate. This motivation, then, is justified largely by appeal to reflective equilibrium; without assuming any particular coercive social arrangements are legitimate, we have a presumption against complete philosophical anarchy – the position that no coercive authority is legitimate. This motivation, then, encourages us to identify a theory of idealization that makes it possible for at least some institutions and arrangements to be justified for all. A theory of idealization which does nothing more than vindicate anarchy is presumptively problematic.

We can evaluate competing theories of idealization by how well they incorporate and reflect the diversity and social motivations. Any theories of idealization which are inconsistent with these basic motivations are clearly not proper candidate theories, and then of the remaining candidates those which best fit with the motivations should be preferred. My claim is that a form of moderate idealization, which lies between populism, on the one hand, and radical idealization, on the other, best fits with the motivations. Populism runs afoul of the social motivation while radical idealization runs afoul of the diversity motivation.

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2.2. Populism, Disagreement, & the Legitimacy of Liberal Institutions

Few, if any, public reason theorists endorse populism, the view that we determine citizens’ reasons by appeal to their actual commitments. But if one of the core motivations for public reason theory is the observation that modern free societies are characterized by actual people who actually disagree, it would seem the natural starting point. Additionally, some critics of public reason approaches in general, most notably David Enoch, have argued that the core motivations of public reason views should lead public reason theorists to effectively endorse populism. In endorsing some form of idealization, such theorists are being “objectionably ad hoc”. Thus, insofar as public reason theorists are committed to some form of idealization, and therefore the rejection of populism, it is important to reconcile this rejection with the core motivations of public reason theory.

The core argument in favor of populism, and against any form of idealization, is that populism does best to accord with the diversity motivation. Indeed, the stronger argument is that only populism accords with the motivation at all, and that there are no proper candidate idealization theories. This core argument can be divided into two parts, each one emphasizing a different aspect of the diversity motivation. In the first place, it can be argued that populism best fits with a recognition of reasonable disagreement since it does not idealize away any of the disagreement we see in society. In the second place, it has been argued that coercing a person in accord with idealized commitments, rather than actual commitments, is itself disrespectful; to

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93 Christopher Eberle and Gerald Gaus both discuss, without endorsing, populism. See, Eberle, Religious Conviction in Liberal Politics, 200; Gaus, Justificatory Liberalism, 130–31.
95 Enoch, 165.
truly respect persons as free and equal is to only coerce them in accord with norms and policies that they actually endorse.96

In contrast, the core argument against populism emphasizes the social motivation. The central worry is that if we do not idealize at all, and therefore let peoples’ actual commitments hold sway, we will not be able to justify any coercive social arrangements at all.97 We will be held hostage to prejudice and irrationality as people insist they do not have reason to endorse even the most intuitively legitimate coercive social arrangements. More generally, when we observe actual real life political disagreement, it is easy to believe that there is just so much disagreement that the likelihood that all citizens will endorse the same arrangement is minute. Given a commitment to vindicating some form of common social life, if populism would effectively result in anarchy then that is reason to reject populism; it fails to fit with one of the core motivations for public reason theory.

2.3. Diversity and Radical Idealization

Radical approaches to idealization generally craft an ideal agent who is fully informed and reasons through issues perfectly and completely. Such an approach, I argue, results in idealized agents who are so alien to actual people that many of the reasons they have could not reasonably be identified as fitting with the actual commitments of actual people. Radical idealization does not clean up individual reasoning in order to identify what reasons they actually have, but rather

96 Enoch, 166–67; Gaus, Justificatory Liberalism, 130–31 Note, Gaus discusses, but does not endorse, this argument. 97 Jonathan Quong, “Liberalism without Perfection: Replies to Gaus, Colburn, Chan, and Bocchiola,” Philosophy and Public Issues 2, no. 2 (2012): 55; Jonathan Quong’s theory of idealization is explicitly aimed at preventing this by making it the case that idealized citizens accept and give priority to liberal values. See Quong, Liberalism without Perfection, 2011, 291; David Enoch also mentions this justification for idealization in his critique of public reason. See Enoch, “The Disorder of Public Reason,” October 2013, 164.
changes people from who they are into someone else, and then suggests that since the counterpart would endorse an arrangement, the actual person should endorse the arrangement. We should reject this view for two main reasons: (1) it involves effectively eliminating the diversity that motivates the public reason project by significantly normalizing peoples’ beliefs, values, and/or reasoning ability; (2) it fails to respect people as free and equal by suggesting that they are mistaken about their own normative commitments.

Actual people are regularly plagued by false information and various obstacles to good reasoning.\(^9^8\) This, combined with the fact that a diverse society of actual people is unlikely to vindicate even the most intuitively legitimate social institutions, has led many public reason theorists to embrace a theory of radical idealization.\(^9^9\) While the specific details of any given theory may vary, the core idea is that we correct for false information by crafting ideal agents who are fully informed and we correct for bad reasoning by crafting ideal agents who always follow proper epistemic norms and have the full powers of reasoning.\(^1^0^0\) In so doing, we all but guarantee the legitimacy of central social institutions and a great deal more.\(^1^0^1\)

While radical idealization certainly falls in line with the social motivation, it does so at the expense of properly accounting for diversity. This is because radical idealization involves significant normalization of peoples’ belief-value sets, often to the point where they no longer

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\(^1^0^0\) Gaus, *The Order of Public Reason*, 238.

\(^1^0^1\) The guarantee of liberal institutions is precisely Quong’s justification for radical idealization. Quong, “Liberalism without Perfection: Replies to Gaus, Colburn, Chan, and Bocchiola,” 55; Rawls also thinks that this approach will end up with determinate justification for something more akin to a strong liberal welfare state. See Rawls, *Political Liberalism*, 2005, chap. 8.
have distinct belief-value sets. This is most obvious with Rawls’s Original Position, where the process of idealization is so extreme that once it is done, every individual is “convinced by the same arguments” and rather than asking what would they (the representatives in the Original Position) choose, we can simply select one person at random, since whatever that person would choose is what all of them would choose. But it was the presence of distinct belief-value sets, and the reasonable disagreement which arises partly because of them, that motivated the project of public reason in the first place.

Excessive normalization is one way in which radical idealization can run afoul of the diversity motivation. But even if radical idealization does not result in everyone reasoning the same, it still involves a problematic connection between the output of idealization and actual peoples’ belief-value sets. The idealized outputs are simply alien to the actual people – so distant from their actual thinking and their actual belief-value sets that it cannot truly be said that we idealized them. The difference is akin to the difference between providing a charitable reconstruction of an argument and simply providing a different argument for a totally different conclusion (but on a related topic). As a college professor, if I listen to a student and then reconstruct her argument using my greater knowledge of logic and comprehension of key concepts, the student will still (hopefully) recognize the argument and its conclusion and implications as her own. Alternatively, if I listen to a student’s argument but then just offer a more technical argument for a different conclusion on the same topic, she’d be right to deny that

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102 Rawls, *A Theory of Justice*, 1999, 120. Of course, in *Political Liberalism*, Rawls adds additional steps to the process of justification which do not so thoroughly idealize. I am not claiming here that Rawls’s view in *Political Liberalism* is an example of radical idealization. However, Jonathan Quong’s Rawlsian public reason view does put central emphasis on the Original Position, at the expense of the other steps (namely the Overlapping Consensus) and in that way is an example of a public reason view which embraces radical idealization. See Quong, *Liberalism without Perfection*, 2011, chap. 6.

103 Gaus has challenged the possibility that even radical idealization can result in singular, determinate answers. See Gaus, *The Order of Public Reason*, 242.
such an argument was her own. Radical idealization involves the latter, but what we want from a theory of idealization is the former.

More technically, the reasons which radical idealization outputs are not accessible to the actual people who we are, inevitably, interested in justifying coercion to.¹⁰⁴ For a reason to be accessible, it must be the case that the real person, given her actual belief-value set, has a rational route to coming to endorse the reason.¹⁰⁵ In this way, an accessible reason may be a tacit belief—something an agent is committed to because of other commitments they have. For instance, if Aly is a committed utilitarian, then she would have reason to kill one innocent person to save many other innocent people, even if she has not thought about that situation before.¹⁰⁶

Alternatively, we may imagine that Barry is strongly committed to something like Kant’s Principle of Humanity, and so he does not have reason to kill one innocent person to save many other innocent people. Different reasons are accessible to Aly and Barry, given their belief-value sets; as a result, different beliefs are justified for Aly and Barry. The excessive normalization that occurs with radical idealization, however, ends up denying this. It may end up insisting, for instance, that both Aly and Barry are committed to killing one innocent person to save many others by suggesting that with full information and full reasoning ability, everyone will come to see that utilitarianism is the correct moral theory. In this way, the output of the idealization process ends up looking no different from simply claiming that there are reasons, external to any agents, which justify (or not) beliefs regardless of whether any given agent actually believes for

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¹⁰⁴ Gaus, 238. In the public reason literature, “accessibility” is used in two unrelated ways. One way it is commonly used, which is not how I am using it here, involves deciding what sorts of reasons are relevant to public justification. Accessible reasons are reasons one person has but that others can access in some specified way. The form of accessibility I focus on here is not interpersonal in this way.

¹⁰⁵ Alvin I. Goldman, “Internalism, Externalism, and the Architecture of Justification,” The Journal of Philosophy 106, no. 6 (2009): 311. The term ‘reason’ here should be understood as a belief that is supposed to function in a certain way, namely as a justification for accepting or rejecting some other belief.

¹⁰⁶ This example can be found in Gaus, Justificatory Liberalism, 37–38.
those reasons or not. This is an approach to justification, but it is not one accepted by public reason liberals, who eschew this sort of externalist justification for coercion in favor of an internalist approach, which must anchor the justification of coercion in the agent’s actual belief-value set.107

We can summarize the core issue with radical idealization this way: A central motivation of public reason liberalism is respect for reasonable pluralism. This motivation leads public reason theorists to aim to justify coercion to diverse individuals on their own terms. Radical idealization fails to do this because it either eliminates the diversity up front by giving all idealized agents the same belief-value set or it improperly links the justifications for coercion to actual agents’ belief-value sets by outputting reasons which are potentially inaccessible to those agents. In this way, the populist arguments against idealization do get a grip with radical idealization.

2.4. Embracing Diversity & Liberalism: Moderate Idealization

Both populism and radical idealization run afoul of one of the central motivations for public reason liberalism. Populism fails to properly fit with the liberalism motivation while radical idealization fails to properly fit with the diversity motivation. A theory of moderate idealization, on the other hand, best fits with both motivations. In brief, moderate idealization is always anchored in the belief-value sets of actual people, like populism; but it also cleans up, to a degree, the information and reasoning abilities of those people, like radical idealization. The

107 Jonathan Quong, “Public Reason,” ed. Edward Zalta, The Stanford Encyclopedia of Philosophy, Summer 2013, http://plato.stanford.edu/archives/sum2013/entries/public-reason/ Importantly, public reason theorists need not be committed to internal justification across the board. Rather, the central commitment is that when it comes to the justification of coercion - or the legitimizing of authority - justification must be internal. This is compatible with justification in other situations being external.
central feature of moderate idealization is a focus on a standard of rational deliberation for real people, a standard that allows at least some people, some of the time, to actually identify sufficient justifications for their beliefs and actions even while admitting that they could still be wrong.\textsuperscript{108}

Recall that the central aim of public reason liberalism is to harmonize the freedom and equality of all persons with the imposition of coercive authority over them.\textsuperscript{109} The harmonization occurs just when the PPJ is met, thus when each person has sufficient reason of her own to endorse the coercive social arrangement. The point of a theory of idealization, then, is to help us figure out when an agent has a sufficient reason. In this way, a theory of idealization is a heuristic that is aimed at helping us figure out what reasons we actually have (or, more precisely, are committed to); that is why the idealization must be anchored in some way to us as real people, for otherwise the outputs are not reasons we are committed to, but rather reasons we would have if we were different people.\textsuperscript{110} Those who endorse theories of moderate idealization recognize this, and so put forth a principle of sufficient reason that incorporates the fact that real agents are always environmentally constrained in their ability to reason, and thus that their reasoning is always non-terminating and their conclusions always open to further revision.\textsuperscript{111} Gaus provides one such principle:

\begin{itemize}
\item \textsuperscript{108} Gaus, \textit{The Order of Public Reason}, 247.
\item \textsuperscript{110} Rawls, \textit{Political Liberalism}, 2005, 28.
\item \textsuperscript{111} Vallier, \textit{Liberal Politics and Public Faith}, 160–62.
\end{itemize}
The Reasons One (provisionally) Has: Alf has (provisionally) a sufficient reason \( R \) if and only if a “respectable amount” of good reasoning by Alf would conclude that \( R \) is an undefeated reason (to act or believe).\(^{112}\)

Gaus’s principle is illustrative of moderate idealization generally. It explicitly identifies an agent’s reasons as provisional and thus open to revision in light of additional reasoning or new information. Nonetheless, it permits that agents can be justified in a belief (that is, have sufficient reason for the belief) even if further reasoning would overturn that justification. This, then, makes it possible for real agents to, at least some times, be justified in their beliefs and for this to be identifiable as such. And this is precisely because the level of idealization is not extreme – as Gaus’s principle indicates an agent can be justified in a belief if she has undefeated reason for it after a “respectable amount” of good reasoning. We can, it is suggested, identify when someone has actually engaged in a respectable amount of good reasoning; but, of course, we cannot identify when someone has actually engaged in complete and perfect reasoning with full information.

Gaus’s principle calls out for an explication of what a “respectable amount” of good reasoning is, as well as what it means to have an undefeated reason. To understand what an undefeated reason is, it is helpful to consider what may defeat a reason. Consider any reason for a belief. Properly speaking, if a reason \( R_1 \) is a reason to believe \( B \) then there is a proper inference from \( R_1 \) to \( B \). That connection can be defeated in two ways: (1) the inference can be undermined by another reason, \( R_2 \), which is then a reason to not hold that \( R_1 \) is a reason to believe \( B \); (2) the defeater, \( R_2 \), can rebut \( R_1 \) by providing a stronger reason to believe not-\( B \).\(^{113}\) Put more simply, a

\(^{112}\) Gaus, *The Order of Public Reason*, 250.

reason to believe is defeated if there are other reasons which count more strongly in favor of the contradictory belief or if there are other reasons which undermine the inferential connection between the initial reason and the belief it was supposed to justify. Thus, let’s say that Barry believes the Sun revolves around the Earth because that is what his father taught him. His reason for belief is the testimony of his father, and so that reason may be undermined by recognizing that his father knows nothing about astronomy; alternatively, the reason may be rebutted by gathering information about what experts in astronomy believe or by observing the phases of Venus.

In sum, an undefeated reason for a belief is simply one that has not been undermined or rebutted. But, importantly, in the larger theory of idealization, these reasons are provisionally undefeated after a respectable amount of good reasoning. This implies that further good reasoning may uncover defeaters – reasons which undermine or rebut the inference from reason to belief. Nonetheless, a person may be justified in her belief – have an undefeated reason for it – so long as she has engaged in a respectable amount of good reasoning without uncovering a defeater. What constitutes a “respectable amount,” however, varies with the domain of inquiry; and this is largely recognized in our social lives. For instance, we expect relatively quick judgments from referees during sports competitions, but we caution against such quick judgments in the seminar room.114 In this way, it is possible to both suggest that some actual peoples’ beliefs in the political domain are unjustified – for they are not based on a respectable amount of reasoning in that domain – and that other actual peoples’ beliefs in the political domain are justified, even though they could turn out to be unjustified after further inquiry.

Moderate idealization, thus, captures key features of both populism and radical idealization. It maintains the diversity that drove us to be interested in public justification in the first place. Different people, with different belief-value sets, will often reach distinct conclusions about a matter even though they all have engaged in a respectable amount of good reasoning. This is in contrast to common theories of radical idealization which suggest that such idealized agents will all reach the same conclusion. Additionally, though, by requiring a respectable amount of good reasoning, and by circumscribing the relevant reasons to only those that are undefeated, the theory is able to avoid the central pitfalls of populism. Actual people often have unreflective beliefs, and often when they engage in reasoning it is infected by a variety of biases, including a bias to cling to a belief despite clear defeaters. We do not want the legitimacy of our social and political system to be held hostage to such unjustified beliefs and poor reasoning, and a theory of moderate idealization makes sure of that.

2.5. Moderate Idealization in Practice

Social and political decisions often involve beliefs from a variety of domains. This means that we cannot identify, in advance, what constitutes a respectable amount of good reasoning for all such decisions. The importance of the decision, the arena of the decision, and the sorts of considerations relevant to the decision will all factor into specific judgments. Nonetheless, we can get a sense of how moderate idealization would work in practice by reflecting on some general features of all social and political decisions.

The first thing to observe is that social and political decisions are, in an important sense, the domain of everyone. This is evident in the fact that a theory of legitimacy is aimed at justifying social and political coercion for all to whom it applies, and not just to (for instance)
political philosophers. It also follows from reflection on the sorts of liberal democratic principles that we commonly accept such as the idea that the government, and society more generally, should reflect in some way the will of the people. This suggests a rough upper bound on what constitutes a respectable amount of good reasoning. We cannot set the bar so high that it is never possible for a wide swath of the public to ever even potentially engage in the requisite amount of reasoning. One should not need to be trained as a Philosopher-King to even have the chance to engage in a respectable amount of good reasoning regarding social and political decisions. As Gaus suggests, “we cannot ascribe to moral agents reason to accept infinite utility calculations… or the original position”.115 We, as moral or political philosophers, cannot insist that the moral beliefs of non-philosophers are unjustified simply because they have not studied social contract theory.

Importantly, however, this does not mean anything goes. It is still the case that many actual people regularly fail to engage in a respectable amount of good reasoning, even if they are potentially capable of it.116 We know, further, that we are even more susceptible to systematic biases and poor reasoning when it comes to issues of morality and politics, issues we often care deeply about.117 Thus, although we should not suggest that most normal citizens are incapable of engaging in the respectable amount of good reasoning, we also should not suggest that the actual reasoning most normal citizens do engage in meets our standards. This helps us get some sense of a lower bound on what constitutes a respectable amount of good reasoning. The sort of

115 Gaus, 254.
reasoning, common to our everyday lives and plagued by cognitive and other biases, is not a respectable amount of good reasoning.

Finally, it is worth noting the very real social nature of reasoning, which we can exploit in establishing our standard of good reasoning. We often come to form beliefs about very complex matters by deferring to expert authorities on those matters. When I come to believe that anthropogenic climate change is real, it is not because I understand the climate models. Rather, it is because I understand how the scientific method generally works and that a significant and on-going consensus among climate scientists on the matter gives me strong reason to believe that anthropogenic climate change is real. In this case, very complex beliefs are accessible to me although I am far from an expert in climate science. Similarly, when I take my student’s argument in class and reconstruct it and spell out the further implications, I have made certain reasons accessible to my student even if she would not have produced that reasoning on her own. We often rely on sophisticated reasoners to make various considerations accessible to us in this way. In effect, such people are also expert authorities on the matter of reasoning, and so we can be justified in believing what they tell us because they tell it to us. The presence of expert authorities and sophisticated reasoners is one very real means by which many come to access beliefs and reasons they couldn’t have come to on their own, and we can incorporate that phenomenon into our understanding of what is and is not accessible to most people.

These last two points about the lower bound of idealization and the social nature of reasoning should help to assuage the sort of concerns which often lead people to support radical idealization. There is a fear that anything less than radical idealization will result in social policy based on conclusions embraced by the common public but rejected by experts in the field. We may point to beliefs about anthropogenic climate change as an example. But the point I am
making here is that beliefs about the reality of anthropogenic climate change are in fact accessible to most everyone, and so it would be fitting with moderate idealization to clean up that piece of information.

2.6. Idealizing Motivation

The theory of moderate idealization discussed above has focused on the informational and reasoning dimensions. In brief, we idealize agents so that they only engage in good reasoning – reasoning that follows commonly identified norms of good inference – but do not expect them to reason forever. Further, the amount of information we expect them to collect is context-sensitive, but never amounts to something like “full information.” There is a final dimension across which we must idealize agents, as well: their motivations. We are pushed to idealization motivation to ensure that our society is not held hostage to those who have no desire to live in a society, or who will free ride at every opportunity. We want to know what sorts of coercive social arrangements are justified for people who want to live in a cooperative society, and broadly be fair members of that society. In the Rawlsian tradition this is usually understood as what defines citizens as “reasonable” in opposition to “rational.” As previously mentioned, this dimension does not lend itself to being placed on a continuum like the previous two, since it largely involves understanding people to have certain motivations that actual people may not (always) have.

Idealizing along the motivation dimension is largely aimed at capturing the insight that normal members of society both want to pursue their own plans and projects and live in a society

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with others. As such, we do not understand idealized agents as wholly willing to accept whatever society demands of them, but we also do not understand idealized agents to be interested in social interaction only to the extent that it helps them achieve their personal ends. Thus, we understand citizens as wanting social arrangements to reflect what they think is best, but also recognizing that whatever social arrangements are adopted should be publicly justified. Thus, they are not interested in getting their way at any cost: they are disposed to offer justifications for their proposals and abide by the justified proposals of others, even if those justified proposals were not their optimal solution.\textsuperscript{119} We can further explicate the central motivations by noting that a person who is disposed to offer justifications and abide by justified proposals would be doing this because she recognizes that much of the disagreement in a modern free society is \textit{reasonable}, a result of the exercise of human reason under free institutions,\textsuperscript{120} and therefore she recognizes the “burdens of judgment” that lead to this reasonable disagreement.\textsuperscript{121} Finally, given both of these dispositions, we can also say that our idealized persons believe it is morally objectionable to impose coercive demands on people that they could not accept.\textsuperscript{122}

We thus understand our idealized agents as wanting to participate in society, and therefore being willing to limit the pursuit of their own ends in line with publicly justified coercive social arrangements. This is both because it is in their self-interest – the stability that a publicly justified society provides makes it easier, in the long run, to achieve one’s own ends – and because they are morally committed to a publicly justified society.

\textsuperscript{120} Rawls, \textit{Political Liberalism}, 2005, 4.
3. The Reasons of Public Justification

There are two broad approaches to public justification, which influence how we interpret the notion of a sufficient reason. On the consensus approach, the aim of public justification is to have diverse members of the public achieve consensus on *why a coercive social arrangement is justified*. For some, *strong consensus theorists*, this means that all members of the public must endorse the arrangement for the *same reason*. For *weak consensus theorists*, on the other hand, members of the public must all agree on the stock of reasons relevant to public justification generally, but can identify different reasons among that stock as justifying any particular arrangement. A strong consensus theorist would, for instance, claim that a law mandating affirmative action was justified so long as everyone agreed that considerations of fairness provided sufficient reason for the law. A weak consensus theorist, on the other hand, would permit some to appeal to considerations of fairness while others appeal to economic considerations, so long as everyone agreed that both the fairness considerations and the economic considerations were generally the right sorts of considerations to appeal to in justifying law. For Convergence Theorists, on the other hand, the aim of public justification is for everyone to converge, from their diverse perspectives, on the same coercive social arrangement. Here, the consensus is not on *why* the arrangement is justified, but simply that it *is* justified.

The consensus and convergence approaches spell out different accounts of the reasons relevant to public justification. Since consensus approaches need everyone to agree on the same reasons – either for a particular arrangement or as a general set – they are going to more significantly restrict what counts as a “public reason” relative to convergence approaches. Convergence approaches are much more permissive regarding the sorts of reasons relative to
public justification, since it need not be the case that everyone shares the reason for an arrangement nor even that everyone agrees an individual’s reason for supporting an arrangement would count as a reason for everyone.

3.1. The Incompleteness of Consensus Models

The concern for public justification arises in the context of a diverse society characterized by reasonable pluralism. If all members of a society held largely the same views about the good, the holy, the right, and the just, then there would be little concern that the coercive social arrangements in that society were illegitimate. It is precisely because there is a significant amount of disagreement that we are concerned with public justification. Consensus models, in response to this disagreement, attempt to retreat to a shared base; Rawls, for instance, argues that all citizens could appeal to the reasons that fall out of the shared political conception of justice, despite their other philosophical and religious disagreements. Unfortunately, such an approach depends on a large set of shared reasons, which is unlikely to exist in a sufficiently diverse society. This being so, public reason – as understood by the consensus model – would be incomplete: it would be unable to render verdicts on matters central to any liberal society. This would imply, then, that insofar as a society nonetheless establishes coercive social arrangements on those matters in which public reason is silent, those arrangements would necessarily be illegitimate.

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123 Rawls, *Political Liberalism*, 2005, chap. 6 I should note here, that Rawls loosens his restrictions in his final statement on the issue. Yet, nonetheless, he holds out hope of a sufficiently large set of shared reasons which all citizens can appeal to in deciding constitutional matters and issues of basic justice.
The central claim of the incompleteness objection is that a large number of issues (or at least some essential issues) that any society must resolve necessarily depend, for their resolution, on appeal to non-shared moral, religious, or philosophical claims. Some who level the incompleteness objection suggest that all, or nearly all, social and political matters depend for their resolution on appeal to controversial religious or philosophical claims; others note specific issues which seem to, even if others may be able to be settled by appeal to a set of shared reasons. Such issues include abortion, justice for future generations, and the treatment of animals. Consider the issue of the treatment of animals. According to Rawls, this is not a case where public reason is incomplete, because “there are numerous political values… to invoke”, namely political values that take for granted the moral status of humans and deny the moral status of animals. While Rawls may be right that there are certain shared values and reasons that can be appealed to, there is a controversial background assumption being made – namely that “animals and nature are seen as subject to our use and wont” and therefore are not morally or politically relevant in their own right. This background assumption is not itself settled by appeal to shared reasons, for indeed there are many who deny it. The controversy over abortion is similar, for it seems to depend (for many at least) on the metaphysics of personhood, an issue over which people reasonably disagree. Thus, here again, we have an important social

127 Rawls, Political Liberalism, 2005, 245.
128 Rawls, 245.
129 Reidy, “Rawls’s Wide View of Public Reason,” 2000, 69; Interestingly, Rawls himself recognizes there are such people as well when he notes that “some will not accept these values as alone sufficient to settle the case. Thus, suppose our attitude toward the world is one of natural religion...” Rawls, Political Liberalism, 2005, 245–46.
issue (or set of issues) which any society must resolve and yet cannot be resolved by appeal to shared reasons alone.

If certain issues cannot be resolved by appeal to shared reasons alone, and yet the issues must be resolved for a society to function at all, then on the consensus model the result will be unjustified coercion. It will not be the case that members of the public have sufficient reason to endorse any arrangement, since no arrangement is publicly justified by appeal to shared reasons alone, and so such arrangements will be illegitimate. Contrast this with how a convergence approach would handle such issues. On a convergence approach, members of the public may appeal to non-shared reasons, including reasons emanating from controversial moral or religious doctrines, in order to justify coercive social arrangements. In such a case, public reason will not be silent, and therefore it will not end up being incomplete. There is, at least, the possibility of locating a legitimate arrangement.

The central benefit of the convergence model on such issues is that it permits the building of coalitions. On the consensus model, all must endorse the arrangement for the same reasons (or at least appeal to the same set of reasons), on the convergence model members of the public may endorse an arrangement for reasons which others reject. This allows people, and groups, with disparate reasons, to unite in their support of a common policy. For instance, members of the Christian faith who understand the “dominion” God gave humans over the Earth as implying a certain stewardship and protection of animals and the natural environment can endorse animal protection on that basis; meanwhile, others may appeal to arguments in moral philosophy to

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132 For defense of such a position see, e.g., Matthew Scully, Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy, Reprint edition (New York, N.Y.: St. Martin’s Griffin, 2003).
hold that animals have a high degree of moral status which supports those very same animal protection policies.

Convergence models of public reason, then, are superior to consensus models by having greater potential to avoid incompleteness worries. Certainly, at this point, one may worry that although there is the possibility of coalition building with convergence, it will still often be the case that there is no agreement, even from diverse perspectives, on a particular policy proposal. This is a reasonable practical concern, but I set it aside for now.\textsuperscript{133} What is important about the incompleteness objection is that it shows, at the theoretical level, that a consensus model is effectively committed to illegitimate arrangements while the convergence model is not. Put another way, the convergence model at least permits political debate to happen on the issue, in terms of (its account of) public reason; the consensus model suggests that the debate cannot even get off the ground, because there are not shared considerations to appeal to in that debate.

3.2. Consensus, Convergence, and the Bases of Public Reason

On top of avoiding the incompleteness objection, the convergence approach to public justification best fits with the underlying motivations for public reason liberalism. Recall the two motivations that underwrite any theory of public reason:

\textit{Diversity Motivation}: Public reason liberalism is motivated by a recognition of reasonable pluralism. To that end, public reason approaches should aim to maintain as much of that evaluative diversity as possible.

\textsuperscript{133} I take up this concern in Chapter 3: Does Asymmetric Convergence Risk Anarchy?
**Social Motivation:** Public reason liberalism is motivated by the idea that we all do better by organizing around a common social life. To that end, public reason approaches should aim to vindicate the legitimacy of at least some coercive social arrangements.

An account of personal justification, such as the one offered above (§2.4) "shows how reasonable pluralism is possible." Following Gaus, we can note that the idea of reasonable pluralism is the idea that "one can justifiably hold a belief… that cannot be publicly justified." As such, an account of idealization – which is an account of personal justification – underwrites how people can reach different, incompatible conclusions and yet their disagreement nonetheless be reasonable. And this is precisely because they have beliefs and commitments that are not shared. Thus, the starting point for any model of public reason is with an account of personal justification which permits people to have incompatible, but nonetheless justified beliefs. The consensus and convergence models then diverge when the consensus approach restricts the scope of reasonable disagreement that is relevant to public justification.

We should reject such a restriction. First, a consensus approach, like radical idealization, simply attempts to wash away the reasonable disagreement that motivates public justification in the first place. It suggests that the sorts of disagreements that mark a modern diverse society are largely illusory, since there is a privileged position – the position of shared reasons – which is not marked by disagreement. Further, a convergence approach better inculcates one of the key features of reasonable persons: the acceptance of the burdens of judgment and the reasonable pluralism that falls out of it. This is because a convergence approach helps “citizens recognize

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135 Gaus, 11.
136 It should be noted here that this is furthers the argument above that radical idealization does not fit with the diversity motivation. It begins by noting a diversity of views in society, and then immediately retreats to a conception of personal justification on which the vast majority (and perhaps all) of that diversity is unreasonable.
that others often have distinct reasons to endorse a proposal” which, according to Vallier, aids a society in promoting “stability, sincerity in political institutions, and increased respect for evaluative diversity.”\textsuperscript{137} This sort of concern, it is worth noting, is about how citizens, actually embracing the public reason ideal, will go about their public lives and engage in political discourse. While, centrally, the focus of public justification is simply the justification of coercive social arrangements, many public reason liberals are also concerned with the development of citizens who engage in politics in the right sort of way. Rawls calls this the “duty of civility”, but the basic focus is on how different conceptions of public reason and public justification may influence the public behavior of citizens.\textsuperscript{138}

We should dwell on this sincerity claim for a moment because consensus theorists do not restrict people, in their personal deliberations, from appealing to non-shared reasons. Thus, any given person may reason her way to support for some coercive social arrangement on the basis of her (for instance) religious reasons. However, when she goes to publicly state her support for the arrangement, she is told she must not appeal to her religious reasons; she must, instead, appeal to shared reasons. And this she may do even though she does not sincerely believe those reasons support the arrangement, or at least that they are not the best support for the arrangement.\textsuperscript{139} In this way, a consensus approach encourages (even if it explicitly rejects) insincerity in politics as well as a sort of perverse motivated reasoning.\textsuperscript{140} For any given individual, she will likely personally deliberate on the basis of her strongest commitments; these are likely to be (at least

\textsuperscript{140}Consensus theorists usually invoke some sort of principle of sincerity, suggesting citizens ought to only offer sincere arguments. Of course, if citizens of the sort I am discussing hold to this mandate, then we may end up with a practical incompleteness problem – no one will offer arguments from the shared perspective even though some are available, since no one actually supports the arrangement on that basis.
partially) non-shared. She will form a conclusion based on this, and then be motivated to accept any shared justification for that conclusion. Thus, not only does a consensus approach do worse in relation to a commitment to reasonable pluralism, it also encourages the precise sort of bad political behavior public reason liberalism seeks to avoid.

Convergence approaches also do better with regard to the liberalism motivation. Consider that a core liberal value is individual liberty. A convergence approach respects individual liberty better than consensus. First, it provides citizens greater freedom in terms of the sorts of reasons they may appeal to and legitimately act upon in public political life. The strong principles of restraint that accompany consensus approaches restrict precisely this. This is particularly problematic when it comes to people of faith and those who are strongly committed to progressive moral principles, such as principled vegans. For both groups are told to “‘privatize’ their [deeply held commitments] and to ‘split’ their identities into public and private halves”. In this way, the liberty of such citizens is restricted. A convergence approach, in contrast, allows such reasons – insofar as they are undefeated reasons resulting from a respectable amount of good reasoning – to play a role in the public sphere, thus permitting citizens with heterodox convictions to nonetheless live “integrated lives”. This represents a better expression of the classical liberal commitment to individual freedom, especially the core liberal commitment to freedom of conscience.

142 Vallier, 265; Vallier is discussing and endorsing an argument he attributes to Nicholas Wolterstorff. Wolterstorff’s argument can be found in Nicholas Wolterstorff and Robert Audi, Religion in the Public Square: The Place of Religious Convictions in Political Debate (Lanham, Md: Rowman & Littlefield Publishers, 1996), 105.
3.3. Asymmetry, Accessibility, and Public Reasons

So far I have argued that we ought to reject the consensus approach to public reasons in favor of the convergence approach. In doing this I have focused on the what some call the *shareability requirement* – that requirement that for a reason to be a public reason, it must be shareable among all idealized members of the public. There are two additional requirements often associated with the consensus approach as well: *symmetry* and *accessibility*.\(^{145}\) According to the *symmetry requirement*, whatever restrictions we place on reasons to *justify* arrangements equally applies to reasons used to *defeat* arrangements.\(^{146}\) According to the *accessibility requirement*, an individual’s reasons can only figure into public justification if all members of the public (suitably idealized) regard the reasons as epistemically justified for the individual on the basis of common evaluative standards.\(^{147}\) The central feature here is the common evaluative standards – although the resultant reasons need not be shared (or shareable), there is a shared set of standards of inquiry that are used to evaluate inferences.\(^{148}\) Convergence theorists all reject symmetry (as well as shareability, discussed above) but differ on the accessibility requirement.\(^{149}\) Below I argue in favor of asymmetry and a weak accessibility condition.

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\(^{145}\) That consensus views can be understood to incorporate these three requirements is discussed in Vallier, *Liberal Politics and Public Faith*, 108–11.

\(^{146}\) This understanding of the symmetry requirement can be found in Gaus and Vallier, “The Roles of Religious Conviction in a Publicly Justified Polity,” January 1, 2009, 62–65; It differs from the one found in Vallier, *Liberal Politics and Public Faith*, 123 but fits better with the common suggestion that convergence views are “asymmetric.”


\(^{149}\) Gaus, for instance, seems to accept an accessibility requirement, albeit a different one from Rawls’s. Vallier, on the other hand, rejects the accessibility requirement. For Gaus on accessibility, especially in contrast to Rawls’s view, see Gaus, *Justificatory Liberalism*, 132–36. In his later work, Gaus discusses “intelligibility” but his account of it seems to fit more properly with what Vallier and others call “accessibility”. See Gaus, *The Order of Public Reason*, 279–80. For Vallier’s rejection of accessibility, see Vallier, “Against Public Reason Liberalism’s Accessibility Requirement.”
My model is asymmetric because it affords a different weight to non-shared reasons when used for justify or defeat an arrangement. A non-shared reason (or set of non-shared reasons) cannot publicly justify an arrangement all on its (their) own. Consider a type of paradigmatic non-shared reasons: religious reasons. Not all members of a pluralistic society will share (the same) religious reasons. So, a coercive social arrangement could not be publicly justified on the basis of religious reasons alone; there will be some members of the public who do not have sufficient reason to endorse the arrangement, since they do not have those religious reasons. Often, as a matter of course, common secular considerations – appeals to health or public safety – may be able to justify an arrangement on their own simply because all people share those concerns. So the weight of non-shared reasons, when it comes to justifying an arrangement, is somewhat weak. Of course, those non-shared reasons can form a patchwork with other non-shared reasons to inevitably justify an arrangement, but the point is they cannot do it alone.

However, non-shared reasons have equal weight with shared reasons when it comes to defeating proposals. In particular, if any member of the public does not have sufficient reason to endorse an arrangement – whether any reasons in favor were defeated by shared reasons or by non-shared reasons – then that arrangement is not publicly justified. The justification for this asymmetry arises for similar reasons to those previously discussed, namely a respect for evaluative diversity and the liberal commitment to freedom of conscience. If we do not permit coercive social arrangements to be defeated by appeal to non-shared reasons, then we are no longer concerned with justifying such arrangements for a diverse public; the diversity of the

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public has been eliminated.\textsuperscript{151} Similarly, a straightforward understanding of the liberal commitment to freedom of conscience is that it is a recognition that when an individual has a non-shared, conscientious objection to some arrangement, then we ought not force such an arrangement on that person.\textsuperscript{152}

According to the traditional accessibility requirement, justificatory reasons must be reached by means of “forms of reasoning and argument available to citizens generally, and so in terms of common sense.”\textsuperscript{153} In this way, “the knowledge and ways of reasoning that ground… [coercive social arrangements] are to rest on the plain truths now widely accepted, or available, to citizens generally.”\textsuperscript{154} A result of this sort of accessibility requirement, endorsed by its proponents, is that religious reasons have no place in public justification because they supposedly result from inaccessible epistemic practices.\textsuperscript{155}

Critics of the traditional accessibility requirement have offered a variety of reasons to reject it. As Gaus argues, “commonsense epistemic norms and practices lead to normatively inappropriate results” since many deviant forms of reasoning are widely endorsed.\textsuperscript{156} Thus, if we only permit the sort of reasoning that is commonly accepted, we will often arrive at unjustified results – results based on obviously flawed reasoning and easily explainable in terms of cognitive bias. Alternatively, Vallier argues that the accessibility condition cannot rule out appeal to

\textsuperscript{151} Cf. Gaus, \textit{The Order of Public Reason}, 276.
\textsuperscript{152} This is, importantly, a \textit{pro tanto} reason to avoid coercing against conscience. There may be, in some circumstances, overriding reason to still do so. See, for instance, Kevin Vallier’s work on religious exemptions: Kevin Vallier, “The Moral Basis of Religious Exemptions,” \textit{Law and Philosophy} 35, no. 1 (2016): 1–28.
\textsuperscript{153} Rawls, \textit{Political Liberalism}, 2005, 162.
\textsuperscript{155} Rawls, \textit{Political Liberalism}, 2005, 247–54; Vallier also discusses this implication of the traditional accessibility requirement. See Vallier, “Against Public Reason Liberalism’s Accessibility Requirement.”
\textsuperscript{156} Gaus, \textit{Justificatory Liberalism}, 133–34.
religious reasons by ruling out the sorts of inferences those reasons are based on.\textsuperscript{157} In particular, Vallier argues that the accessibility requirement cannot be stated in such a way as to rule out appeal to natural theology or religious testimony without also ruling out many of the “commonsense” epistemic norms that consensus theorists want to appeal to.\textsuperscript{158} And so, those who embrace accessibility are in a bind: they must either allow certain inferences common to some religious traditions, and thus allow certain religious reasons, or they must reject certain commonsense epistemic norms. It is therefore either too stringent or a spare wheel; either way, it should be rejected.

If we reject the traditional accessibility requirement, the question becomes what we should replace it with. Here the defenders of convergence theory appear to be at odds, but I think actually end up endorsing roughly the same view, which I will call a weak accessibility requirement.\textsuperscript{159} According to the weak accessibility requirement, there are “basic inferential norms that we necessarily ascribe to all” if we are to make sense of their reasoning.\textsuperscript{160} Without appeal to these norms, we would not be able to recognize the reasons of others; in this way, these “bridgehead” norms make others \textit{intelligible} to us – they help us distinguish reasons from “mere

\begin{footnotes}
\item[157] Vallier, “Against Public Reason Liberalism’s Accessibility Requirement.”
\item[158] Vallier, 368.
\item[159] Gaus explicitly endorses an accessibility condition, while Vallier claims to reject it in favor of an “intelligibility” condition. From my reading of this discussion, Vallier associates accessibility necessarily with the traditional accessibility requirement, and so in rejecting that version believes he must reject the accessibility requirement completely. Particularly of note here is that both Gaus and Vallier discuss “mutual intelligibility” as a requirement; Vallier does not detail what that involves (other than being able to see another’s putative reasons as reasons) while Gaus identifies it as a project of interpretation relying on ascribing certain fundamental epistemic norms (the bridgehead). Thus, despite the terminological difference, Vallier’s “intelligibility requirement” falls in line with Gaus’s version of an accessibility requirement, which is what I am here calling the weak accessibility requirement to further distinguish it from the traditional view. See Gaus, \textit{Justificatory Liberalism}, sec. 4.3, 9.1.2; Vallier, “Against Public Reason Liberalism’s Accessibility Requirement”; Kevin Vallier, “In Defence of Intelligible Reasons in Public Justification,” \textit{The Philosophical Quarterly}, December 4, 2015, pqv117, https://doi.org/10.1093/pq/pqv117; Vallier, \textit{Liberal Politics and Public Faith}, chap. 4.
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utterances and expressions of irrational bias.” These basic norms are not linked to any epistemic norms that actual people actually (claim to) endorse; rather they are based on understanding common, basic inferential rules as “causal laws of thought” forming a “natural mental logic”. Given evidence that actual people are sometimes bad at engaging in certain forms of basic logical reasoning, largely due to limited cognitive resources, it will sometimes be the case, contra the traditional accessibility requirement, that actual people do not explicitly endorse some of the inferential norms, and may actually endorse conflicting inferential norms.

Finally, it is worth noting that this weak accessibility requirement only lays a foundation for identifying the reasons of others. Sometimes, people will reason based on non-basic inferential norms, and we can make sense of their reasons, as justified reasons for them, based on their belief systems even though such reasons would not be justified for us, given our belief systems. Some of the ways people reach religious conclusions may be like this. But what is important is that the bridgehead norms are not violated, even if they are not the basis of making the reasoning intelligible. The bridgehead norms are always still fundamental, and so any inferences based on non-bridgehead inferential norms cannot “override the inferences sanctioned by the fundamental bridgehead norms.” In this way, we capture Vallier’s idea that “intelligible

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161 Vallier, “In Defence of Intelligible Reasons in Public Justification,” 2; Gaus, following Martin Hollis and Steven Lukes, refers to these fundamental norms as a “bridgehead”. Gaus, Justificatory Liberalism, 48.
162 Gaus, Justificatory Liberalism, 47. This sort of approach seems to fit well with Donald Davidson’s work on radical interpretation. See, e.g., Donald Davidson, “Radical Interpretation,” Dialectica 27, no. 1 (1973): 314–328.
163 Gaus suggests the psychological evidence has identified a variety of these sorts of flaws. For instance, people commonly endorse the acceptability of the Gambler’s Fallacy, while not accepting common inferences based on conditionals. Additionally, the work of Kahneman and Tversky on cognitive bias shows us how our limited cognitive resources lead us to actually engaging in deviant reasoning and often endorsing both the results of that reasoning and even the methods of inference. See Gaus, Justificatory Liberalism, 52–62; Kahneman, Slovic, and Tversky, Judgment Under Uncertainty especially “Judgement under uncertainty: Heuristics and biases.”
164 Gaus, Justificatory Liberalism, 52.
165 Gaus, 135n22.
reasons” can be based on non-shared inferential norms, while not reducing our view to mere relativism.

4. Conclusion: The Wide Asymmetric Convergence Model of Public Reason

The picture of public justification I have been drawing here aims to establish the legitimacy of social coercion by appeal to the reasons of all those who are coerced. In this way, we are able to harmonize the freedom and equality of all people with the fact of social coercion. In order to do this, I have argued that we must permit a convergence of distinct, possibly non-shared, reasons to form a patchwork of justification for coercive social arrangements. Additionally, given our commitment to freedom and equality, as all as core liberal values like liberty of conscience, it must be the case that we do not coerce people in ways they cannot endorse, even on the basis of their non-shared moral or religious commitments. However, this does not mean that all actual people actually get a veto on all social coercion. We must idealize people, moderately, in order to uncover their justified reasons. This process of idealization is not aimed at garnering hypothetical consent, but rather is used as a heuristic to identify actual peoples’ actual justified reasons.

My defense of appeal to non-shared reasons and moderate idealization contrasts with the traditional public reason models. On the model I defend, a greater amount of diversity will be preserved after idealizing and will be relevant to public justification. One worry this has raised for public reason theorists and critics alike is that we will be unable to publicly justify many, or perhaps any, of the coercive social arrangements common to a modern liberal society. The concern, then, is that in making our model of public reason properly sensitive to reasonable pluralism, we have all but shown that many, and perhaps all, of our current coercive social
arrangements are illegitimate. This concern is closely related to the Incompleteness Objection previously discussed, but results from too much diversity as opposed to too little. I turn to this *Anarchy Objection* in the next chapter.
CHAPTER III. DOES ASYMMETRIC CONVERGENCE RISK ANARCHY?

Public reason, or political, liberalism holds that coercive social arrangements must be justified for all members of society. Traditionally within public reason, this has been understood in terms of a consensus model of public reason, whereby a coercive social arrangement is justified for all so long as all members of the public endorse the arrangement for the same reason(s).

Convergence models, like the one defended in the previous chapter, take a different approach to public justification. On these models, a coercive social arrangement is publicly justified so long as every member of the public has sufficient reason of their own to endorse the arrangement. For convergence models, it does not matter if members of the public endorse arrangements for the same reason(s), or even endorse the same set of “public reasons”. I have previously argued that a convergence model of public reason better fits with the underlying motivations for public reason liberalism and that such models have a better chance of avoiding a common objection to public reason liberalism, namely the incompleteness objection.

Consensus models of public reason are susceptible to the incompleteness objection because they significantly restrict the set of reasons which can function to justify coercive social arrangements. This restriction means that on certain important political matters, such as whether animals can be owned as private property, public reason liberalism will be silent.\footnote{David A. Reidy, “Rawls’s Wide View of Public Reason: Not Wide Enough,” Res Publica 6, no. 1 (2000): 49–72.} There are simply no shared reasons that can speak to the question of animal ownership, absent assuming first certain contentious claims regarding (for instance) the moral status of animals. By enlarging the set of justificatory reasons, convergence models of public reason are more likely to avoid this
issue of being silent. Although there will be conflicting justificatory reasons regarding the moral status of animals, such reasons will at least be relevant to public justification, and thus public reason will have *something* to say on the matter.

Although convergence models may be able to avoid the incompleteness problem, they may not be able to avoid the problematic result of incompleteness. The reason public reason liberals, such as John Rawls, insist public reason needs to be “complete” was because if it weren’t, then on those matters where it is silent the result would necessarily be *illegitimate*. If there are no reasons to support any policy option, then every policy option is unjustified. Thus, the real issue with incompleteness isn’t the silence itself, but the illegitimacy that results from it. And convergence models may similarly risk illegitimacy. For it has been argued that convergence models place too high of a bar on justification by only moderately idealizing members of the public and then permitting their non-shared reasons to function as *defeaters* for justification.\(^{167}\) The result, it is argued, is that no coercive social arrangement will be justified *for all*, as someone will always fail to have sufficient reason to endorse the arrangement. This means convergence models would fail to vindicate the legitimacy of liberalism, and would instead support philosophical anarchy – the view that no coercive social arrangements are legitimate. And so, in avoiding the incompleteness objection, convergence models of public reason instead face what I call the *anarchy objection*.

The anarchy objection provides decisive reason, for some, to prefer consensus models over convergence models. For others, it indicates that the entire enterprise of public reason liberalism is unworkable. Given the force of this objection, then, I set out in this paper to offer a preliminary defense of convergence public reason against the anarchy objection. What I will suggest, generally, is that the anarchy objection is not so obviously decisive as some have taken it to be. In order to do this, I will begin by (1) motivating the anarchy objection. I will suggest that what we can call the anarchy objection is really a set of nested objections to public reason liberalism. This will help me frame my responses, as I deal with each objection in turn. Thus, in section 2 I focus on the “full” anarchy objection, which holds that no coercive social arrangements will be justified. I argue that the objection misunderstands what it means to have a sufficient reason to endorse an arrangement, and that once we properly consider the moral and prudential value of social coordination we will find that those coercive social arrangements most central to a functioning society are likely to be justified, even in an extremely diverse society. Section 3 turns to the “min-archy” version of the objection, which accepts that core liberal arrangements will turn out to be legitimate, but suggests that convergence public reason is unable to vindicate much more than a minimal or libertarian state which protects individuals from direct violence, but not much else. Here I draw on the shared value of agency as well as the importance of considering social coercion to argue that it is likely that something like the modern liberal welfare state would be legitimate, even in a society which consists of many die-hard libertarians. Finally, section 4 considers the “intuitive” anarchy objection, which holds that various intuitively legitimate laws or coercive social arrangements, beyond those that define even the modern liberal welfare state, would not be vindicated by the convergence model. This objection focuses on what Rawls would identify as “mere legislation” and simply worries, in effect, that
convergence public reason vindicates the sort of government gridlock that has been common to (at least) the contemporary United States.

1. Convergence Liberalism and the Anarchy Objection

It is easy to feel the pull of the anarchy objection when we consider actual political debate. As David Enoch suggests, “[t]he problem is that actual citizens of actual large-scale contemporary states are a very varied bunch. … If the justifications offered to them are to engage them as they actually are… then it’s hard to believe that there is anything at all that can be justified to all.”168 While such reflection should make it obvious that populist accounts of public reason, which do not idealize members of the public at all, are likely hopeless, Enoch insists that appealing to a theory of moderate idealization, as convergence models do, similarly leads to anarchy.169 On his view, only a substantial theory of idealization can avoid the charge of anarchism but, since there are other good reasons to reject such theories, the entire public reason enterprise should be abandoned.170

Enoch’s attack on public reason illustrates the features of convergence public reason that lead to the anarchy objection. First, shared with all public reason views, is the “unanimity requirement”: there must be unanimous agreement among members of the public that a coercive social arrangement is justified for it to be publicly justified. Second, unique to convergence

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170 Ibid., 130; Quong says something similar with regard to the vindication of liberal institutions. Also, it would seem that substantial idealization could avoid Wall’s "self-defeat" objection to public reason liberalism, and thus the anarchy horn of the dilemma he sets up. For Quong’s discussion see Jonathan Quong, “What Is the Point of Public Reason?,” *Philosophical Studies* 170, no. 3 (September 2014): 545–53, doi:10.1007/s11098-013-0270-z; For Wall’s critique see Steven Wall, “Public Reason and Moral Authoritarianism,” *The Philosophical Quarterly* 63, no. 250 (January 2013): 160–69, doi:10.1111/j.1467-9213.2003.
models of public reason, is the use of moderate, rather than radical (or “substantial” in Enoch’s words) idealization. Consensus models avoid the anarchy objection, Enoch believes, because radical idealization ensures there will not be idiosyncratic hold-outs who prevent unanimous assent. Consider, for instance, discussions over a law regulating pornography. Actual people may debate this issue by appeal to various idiosyncratic views – some appeal to feminist philosophy while others appeal to religious norms – and it may not be possible for them to unanimously agree that a single regulatory arrangement is justified. By radically idealizing, the thought is we either jettison the religious norms or the feminist philosophy depending on what the theorist thinks people would accept if they had full information and full rationality. Either way, we are likely to get unanimity and therefore the public justification of some regulatory arrangement.

However, Enoch thinks it is a different matter for convergence views. While the fact that actual people, actually holding the religious or feminist views, may not agree is not itself relevant, a theory of moderate idealization is likely to maintain both sorts of perspectives, at least in broad outline. If this occurs, then the worry is that the feminist members of the public will absolutely reject the religious proposal for pornography regulation while the religious members of the public will absolutely reject the feminist proposal, and thus nothing will be publicly justified. Those who pose the anarchy objection believe this sort of situation will be common within the convergence model. For all political matters there will be some hold-out who prevents unanimity and thus prevents any coercive social arrangement from being publicly justified.

The great innovation of convergence models of public reason is that they significantly increase the set of reasons which can justify coercive social arrangements. But this innovation has a “troubling dark side” in that it also significantly increases the set of reasons which can lead
to the rejection of coercive social arrangements. As Christopher Eberle has noted, the convergence model includes “an extremely demanding understanding of what makes for justified coercion—if there is only one coerced citizen who has conclusive reason to reject [an arrangement], then [that arrangement] is morally wrong, even if [the arrangement] would be justified absent that lone dissenter.” The unanimity requirement is an essential feature of public reason liberalism, with its commitment to respecting all persons as free and equal and its understanding of what that entails, and so it is not possible for convergence public reason to expand the set of reasons which may justify arrangements without similarly expanding the set of reasons which may defeat arrangements. And, in a sufficiently diverse society, the central worry is that someone will have conclusive reason to reject every coercive social arrangement, and so nothing will pass the test of public justification.

So far I have motivated the most robust version of the anarchy objection, or what we may call the “full” anarchy objection. The idea here is that the sort of scenario discussed above, with regard to pornography regulation, will play out across all coercive social arrangements. As Enoch puts it, among even moderately idealized members of the public, “everything is controversial” and so “nothing is justifiable to all.” This version of the anarchy objection is certainly the most powerful. But the objection is still forceful even if some coercive social arrangements will be justifiable for all. If libertarians become effective “dictators” and so only a

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very minimal state can be justified, that may also be objectionable. This would, in effect, be a “min-archy” objection. And finally, even if we can get past the minimal state, and justify some more robust coercive social arrangements, if many of the most intuitively legitimate matters of legislation fail to be vindicated, we may also think that counts against convergence public reason. This final version of the anarchy objection may be called the “intuitive” anarchy objection, since it appeals to the intuitive legitimacy of certain laws or arrangements to argue we should reject the convergence public reason theory of legitimacy.

Now, importantly, it is not the task of political philosophy to simply “legitimate current regimes” but rather “to examine the conditions under which political coercion can be justified.” We should not reject a theory or model simply because it does not vindicate our policy. Nonetheless, we must sometimes use our considered judgments to test principles and theory, and so unintuitive implications do count as some sort of relevant data for evaluating a theory. As Rawls explains in discussing the process of reflective equilibrium, we must “work from both ends,” and not absolutely privilege prior judgments or abstract principles and theory. What this means, then, is that a sufficient response to the anarchy objection need not

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174 This “libertarian dictator” version of the argument is discussed in Lister, “Public Justification and the Limits of State Action,” 2010.
175 This seems to be partly what Lister has in mind when he suggests that “[o]ne worry about the demand for public justifiability is that it would rule out redistributive policies aimed at promoting social justice.” This, of course, is only a worry if one already holds that such redistributive policies are at least plausibly legitimate. See Lister, 152.
176 Gerald F. Gaus, “Liberal Neutrality: A Compelling and Radical Principle,” in Perfectionism and Neutrality: Essays in Liberalism, ed. Steven Wall and George Klosko (Lanham, Md: Rowman & Littlefield Publishers, 2003), 138. It is worth noting here that Enoch, a major critic of the entire public reason enterprise, believes part of his disagreement with public reason theorists is about the role of the political philosopher and political philosophy. On his view, the public reason enterprise isn’t political enough and “the good political philosopher and the political activist… should be allies.” While I agree, roughly, with Enoch’s vision, I do not think his interpretation of the vision of political philosophy endorsed by (all) public reason liberals is accurate. Because of this, I do not believe Enoch’s vision and Gaus’s claim quoted above are necessarily in tension. Indeed, part of Gaus’s complaint with the approach to political philosophy that seeks to legitimate current regimes is that it is “ideologically conservative” and thus, we may suggest, sets the political philosopher too far apart from the activist. For Enoch’s discussion see Enoch, “Against Public Reason,” 134–37.
show that every law or institution desired by those leveling the objection would necessarily be justified. This is both impossible and undesirable. Rather, a sufficient response should be able to offer a plausible vindication of core liberal institutions, and to indicate the possibility that at least some other intuitively legitimate arrangements could be justified.

2. Full Anarchy, Sufficient Reason, and Social Coordination

David Enoch, in offering perhaps the best statement of the full anarchy objection, suggests that convergence public reason, with its commitment to moderate idealization, leads to anarchy because among such idealized persons “everything is controversial” and so “nothing is justifiable to all the reasonable in this [the moderately idealized] sense.”¹⁷⁸ This follows from the observation, previously mentioned, that actual people in actual modern societies are a “very varied bunch” and the fact that a major feature of moderate idealization, discussed in the previous chapter, is that it attempts to maintain the majority of that evaluative diversity even while idealizing the public. It is a feature of moderate idealization, in contrast to radical idealization, that it does not significantly normalize difference. But, the potential downside is that it cannot generate enough agreement to get any sort of society off the ground.

For the sake of argument, let us assume that Enoch is correct that “everything is controversial” among a moderately idealized public.¹⁷⁹ It is certainly the case that many issues, if

¹⁷⁸ Enoch, “Against Public Reason,” 122. To be precise, Enoch is talking about a ‘thin’ “pre-theoretical understanding of the reasonable.” But, on this understanding, reasonability is a function of (in part) reasoning mechanisms functioning well, rather than (for instance) having certain moral dispositions or accepting certain liberal values as fundamental. So, neglecting the use of the term ‘reasonable’ which Gaus and many other convergence theorists largely do away with, the position Enoch is criticizing is largely something like the convergence theorist’s conception of idealization.

¹⁷⁹ I will argue later why we should reject the claim that everything is controversial, at least under one plausible interpretation.
not all, will remain controversial even after idealization. Nonetheless, I will argue that Enoch’s inference from “everything is controversial” to “nothing is justifiable” is unsound. This is because (1) it depends on a misunderstanding of what it means for a member of the public to have ‘sufficient reason’ to endorse an arrangement and (2) it ignores the moral and prudential value of social coordination, which provides all moderately idealized members of the public with some reason to prefer common norms. In what follows I clarify these two features of public reason liberalism and use them to show that even if everything is controversial among a public, it is still the case that some arrangements will be justifiable for all. This is particularly true of those arrangements that are central to liberalism, such as the individual right of private property. Thus, the overall conclusion of this section is that the full anarchy objection fails: convergence public reason can vindicate at least the core liberal institutions.

It will help to have a running example to make sense of the different positions. Consider the following simple scenario: 3 friends are discussing where to go for dinner. Each person has very different preferences: Aly is a committed vegan who strongly prefers plant-centered restaurants; Barry is a “meat and potatoes” guy who strongly prefers a meat-centered restaurant; and Chris only really cares about the social aspect of the dinner. Aly, Barry, and Chris represent the sort of people that Enoch describes as a “very varied bunch.” So, on his view, even if we were to moderately idealize Aly, Barry, and Chris no dinner option would be justifiable for them all. I deny this.

2.1. Disagreement, Ranking Proposals, and Sufficient Reason

While Aly, Barry, and Chris discuss dinner options, Aly and Barry both strongly stump for their preferred options. Barry may even insist that he will only patronize a steakhouse while Aly
insists she will only agree to the new all vegan restaurant. In public reason terms, we may be
tempted to say, as Enoch seems to, that only the new vegan restaurant is justifiable for Aly while
only the steakhouse is justifiable for Barry. And if this were the case, then it looks like nothing is
justifiable for all. But this is a mistake. Although Barry and Aly clearly disagree about which
option is best, and although that disagreement would survive moderate idealization, it is incorrect
to assume that *only* their most preferred restaurant is justifiable for them. Aly, Barry, and Chris
can all have sufficient reason to endorse going to a restaurant which they individually identify as
a suboptimal choice. To have sufficient reason to endorse an arrangement does not mean one
necessarily identifies that arrangement as the best. In actual political debate we do sometimes act
as if we will only accept what we take to be optimal, but it is incorrect to read that sort of ‘saber
rattling’ into the public justification principle and its requirement that all moderately idealized
members of the public have sufficient reason to endorse a coercive social arrangement.

A major goal of public reason liberalism is to show how it is possible for diverse people
to come to live together under common social rule. In our example, we are aiming to show how
it is possible for a diverse set of friends to nonetheless agree to a common location for dinner. In
either case, some public reason theorists are of the view that through public reason we will be
able to uncover determinate answers to all or most of our pressing political questions. They
would hold that there is a clear restaurant which the public reason of Aly, Barry, and Chris
supports. For instance, John Rawls initially held that justice as fairness was the sole publicly
justified conception of justice. From it, he held, we could determine how our political society
ought to be arranged. While Rawls would go on to reject this view, inevitably claiming that
justice as fairness is only a member of a set of publicly justified conceptions of justice,

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consensus theorists such as Jonathan Quong still tow the original Rawlsian line.\textsuperscript{181} And on this understanding of public reason, if everything is controversial, then nothing is justified. Singular correct answers to political questions do require that certain matters are uncontroversial, at least at the relevant level of idealization. This is, of course, why consensus models need a more thorough theory of idealization – it is vital that idealized Aly and Barry agree on a specific restaurant, as well as the reason(s) for that restaurant. Convergence models, however, largely reject the claim that there are determinate answers to political questions. The public reason of Aly, Barry, and Chris will not necessarily determine which restaurant they should eat at. Rather, the model is aimed at helping us narrow down the set of possibilities. Given this difference, convergence approaches are not necessarily impugned by the prevalence of disagreement.

An important insight from convergence theorists is that indeterminacy is a necessary part of a theory of public justification: Absent radically idealizing members of the public, which should be avoided for reasons previously discussed, we are not likely to establish singularly determinate answers to most political questions.\textsuperscript{182} If we take reasonable pluralism seriously, then we must admit that indeterminacy will abound. We must accept that Aly, Barry, and Chris will not agree on the optimal restaurant. It is in accepting this fact, and developing a model of public justification which takes it seriously, however, that we see how public justification is possible in the face of indeterminacy.

Recall that we are motivated to accept some theory of public reason out of a commitment to the freedom and equality of all people and because we recognize the fact of reasonable pluralism. Our aim is to reconcile the status of all people as free and equal with the authority we,

\textsuperscript{181} For Rawls’s shift, see “Public Reason Revisisted” in Rawls, 440–90. The most complete statement of Quong’s Rawlsian position can be found in Quong, Liberalism without Perfection, 2011.

\textsuperscript{182} Gaus, The Order of Public Reason, 43.
as a society, exercise over each other. But since a society of free and equal people will necessarily be characterized by reasonable disagreement, we cannot expect everyone to agree on what is best. The whole point of a theory of public justification, then, is to provide “an account of how people who disagree on the best may still come to endorse a common rule.” Thus, any plausible theory of public justification must, by necessity, allow for the public justification of rules which some consider sub-optimal. This also fits with our general understanding of what it means to live in a society. We commonly think that living with others requires “compromise” – it means not always getting what you believe is ideal. But, of course, we also do not think that living in a society should require you to “compromise on your principles,” and so it does not require living in accord with norms or rules that you find wholly unacceptable.

The above reflection on the point of, and underlying motivations for, public justification have direct implications for the construction of the deliberative model we use to investigate what sorts of policies pass the test of the PPJ. In our dinner example, we begin by constructing a ranking of options for each individual: clearly Aly ranks the new vegan restaurant as best while Barry ranks the steakhouse as best, but all three friends have other options on their rankings. To construct these rankings, we do not simply consider “where do you want to go for dinner?” but instead construct a ranking based on pair-wise comparisons. Like an eye exam where one cannot judge whether a lens correction is better without having another option to compare, the relevant question is “would you prefer to go to dinner at restaurant A or restaurant B?” and so on for the various options. When the choice situation is modeled in this way, we can start to see how additional options get added to each individual’s rankings: Would Aly prefer to go to the

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184 Gaus provides the most detailed account of the deliberative model in Gaus, The Order of Public Reason, chap. 5.
steakhouse Barry recommends or would she prefer an exotic meats restaurant? Would Barry prefer the vegan restaurant Aly recommends or would he prefer Chinese take-out?

But of course some options may be totally unacceptable. Aly, for instance, may be totally unable to eat a meal at the exotic meats restaurant, and so we need some way of modeling the idea of an option being totally unacceptable. The commitment to the freedom and equality of all people establishes this baseline. Since no person is naturally under the authority of any other, for any given issue the natural baseline is one where each acts in accord with her or his own judgment and there is no common policy on the given matter. It is always deviations from this baseline of natural freedom that stand in need of public justification. Each exercising her natural freedom need not be justified. And so, in the choice situation Aly, Barry, and Chris face, the natural baseline is that they do not go to dinner together at all. Naturally, if they cannot agree to a common place, they will go their separate ways. And for some of the possible options, such as the exotic meats restaurant, some of the individuals would prefer to forgo the social dinner. For Aly, the exotic meats restaurant is worse than no social dinner at all.

Notice the cost Aly pays for ranking the exotic meats restaurant below the baseline. She, Barry, and Chris had first agreed to go to dinner together. They did this for a variety of reasons, not just because they were hungry. Although Chris is quite laid back about the food choices and cares a great deal about the social element, both Aly and Barry are also motivated by the social element of dinner. To rank the exotic meats restaurant as worse than no dinner at all is not simply to refuse to eat exotic meats, it is to refuse all the other benefits that come along with a social dinner. Obviously she may have to make such a refusal in this case. But the important lesson to draw out is that ranking a proposal as worse than no common rule at all is no simple matter. It is not akin to the sort of “my way or the highway” saber rattling that is characteristic of
actual political debate, where we may be blustering for strategic reasons fully knowing that at the end of the day we will end up with some common rule. To suggest that an option is totally unacceptable is to forgo all the benefits that you attach to having a common rule at all.

Aly, Barry, and Chris all have sufficient reason to endorse any of the restaurant options which they prefer to not going to dinner at all. Given that each of them has some preference for going to dinner with each other – analogous to members of the public having some preference for living in society with one another – they all are likely to have a variety of options on their list. From this, we could construct a social ranking, identifying all options which each of them have on their list. This would not determine which restaurant they should go to, but it would identify the set of eligible options. At that point, which they select is not terribly important, for any one of them would be justified for them all.

The forgoing discussion illustrates why Enoch’s inference is unsound. For Aly, Barry, and Chris it was genuinely controversial which restaurant to patronize. But it did not follow that no option was justifiable for them all. Although Barry may claim, in discussion, that he refuses to eat at a vegan restaurant, to actually refuse such an option is to also refuse the company of his friends, and when the choice is put that way we can see why the vegan restaurant may very well be on his list of acceptable proposals. Now, importantly, this discussion of sufficient reason isn’t meant to show that there is some justifiable arrangement with regard to all controversial matters. In certain situations, it may actually be that there is not a single proposal shared among all

185 Technically, there is an additional constraint: any option which is Pareto-dominated is also excluded from the social ranking. For instance, if Aly, Barry, and Chris all had Taco Bell on their lists, it would make the social list. But if they all also had Taco Bueno on their lists, and all preferred Taco Bueno to Taco Bell, then Taco Bell is Pareto-dominated and would be stricken from the list. While this is a useful constraint for further limiting the list, it is not as morally important as the creation of a social ranking which excludes all options that any member of the public considers worse than no rule at all.
members of the public. If Aly and Barry don’t really care to eat together, or care much more about getting their way than eating together, then maybe they won’t be able to coordinate on any option. But merely disagreeing about what is best does not mean that nothing is justifiable.

There is, however, a further point to make about core liberal institutions. So far, Aly, Barry, and Chris have been considering restaurants that are heavily vegan focused or heavily meat focused. But now Chris suggests an Indian restaurant, which has a variety of meat and vegetable curries. In fact, the menu is split nearly in half between vegan options and meat options. Aly has a wide variety of vegan options to choose from while Barry has a variety of meat options to choose from. What was initially a collective decision over whether to eat vegan or not has now become an individual one. While there must still be a collective decision over the specific restaurant, at least one of the major issues that the friends were getting hung up on has been side-stepped. Or, more precisely, the decision has been “devolved” from the collective to the individual. This sort of devolving of authority is precisely what makes liberal institutions, such as private property regimes, so well placed to deal with evaluative diversity. As Gaus explains:

A deeply pluralistic social order can effectively cope with many of its disagreements about what evaluative standards to adopt by establishing a system of private property. … [G]iven the problem of evaluative pluralism, … each Member of the Public has a fundamental interest in instituting a system whereby the natural and social world is divided into different jurisdictions in which the evaluative standards of the… rightholder… will be determinative.\footnote{Gaus, The Order of Public Reason, 375–77.}
Rather than Aly being beholden to Barry’s dietary preferences, or Barry being behold to Aly’s, Chris has suggested an option which allows each of them to remain their own dietary master while still gaining the benefits of a friendly social dinner.

In the political realm, the schemes of rights and liberties which characterize a liberal order accomplish the same sort of goal as the Indian restaurant. There can be social coordination around a scheme of rights and liberties, thus establishing a common authority, but that scheme dictates various zones where the evaluative standards of the individual are supreme. In this way, liberal institutions neatly deal with the fact that “everything is controversial.” And so, thorough-going disagreement need not impugn the public justification of core liberal institutions because such institutions do not involve restricting peoples’ abilities to live their own lives their own way. Rather, they facilitate such an ability by establishing socially recognized jurisdictions of individual authority. Thus, every member of the public will have sufficient reason to endorse some liberal scheme of basic rights and liberties. There will likely still be disagreement over which scheme is best, but so long as there is a non-empty set of socially eligible schemes, then public justification can vindicate the core of liberalism and thereby avoid outright anarchy.

2.2. The Value of Social Coordination

Chris never expressed strong dietary preferences. Rather, her main concern was that she, Aly, and Barry have dinner together. She heavily valued social coordination, and so her ranking of various restaurants would likely be influenced more by what she thought both Aly and Barry would agree to than by what sounded tasty to her. Hence her suggestion of the Indian restaurant. There are people like Chris among the general public, who are heavily motivated by a desire for a good social and political community, and not so much by a desire to have things “their way”.
These sorts of people help illustrate the value of social coordination for everyone, and this is important especially for those people who seem to be much more concerned about getting things their way rather than simply coordinating with others. Social coordination, specifically in the form of a liberal scheme of rights and liberties, is good for everyone, and this provides important moral reason for everyone to endorse a common norm over no norm at all, even if they do not believe it is the optimal norm. This shows another way in which we can establish public justification in the face of evaluative diversity.

Let us imagine that Barry has no food at home, and so his only option for eating dinner is to eat out. But Barry also does not like to eat alone. Thus, for him, successfully coordinating with Aly and Chris helps him pursue his individual plan of actually eating. Much of social coordination is like this, especially when the coordination comes in the form of a liberal scheme of basic rights and liberties. Such a scheme establishes a framework under which people may better pursue their own plans and projects. For Barry, agreeing to go to the Indian restaurant – establishing the liberal scheme – allowed him to achieve his goals of eating a meat-based dinner with others. He was able to achieve these goals, especially the goal of eating a meat-based dinner, without forcing anyone else to share his goals or otherwise have to forgo their goals. Aly still had her vegan meal and Chris still had a social dinner. Each of these friends had individual aims, and it was the social coordination which made the achievement of these aims possible. This is the moral and prudential value of social coordination, and it is a major reason why diverse individuals have sufficient reason to endorse at least some common authority, and most notably the sort of devolved common authority that is characteristic of liberalism.

The fact of reasonable pluralism is not merely the fact that people disagree. What is more important, socially speaking, is that individuals act based on their beliefs and values, and pursue
plans and projects that fall in line with those beliefs and values. If people disagree about fundamental beliefs and values, then it is likely to mean that their ability to pursue their plans and projects will conflict with the ability of others to do the same. If the disagreement remained wholly “in the head”, as it were, then reasonable disagreement would probably not be much of a concern at all. But it is precisely the fact that people act on their beliefs and values, and that doing so may lead to conflict when people disagree, that makes a liberal scheme of rights and liberties so attractive and essential.

A liberal scheme of basic rights and liberties establishes a framework under which people may better pursue their own plans and projects. By establishing a common understanding of the contours of individual jurisdictions, such a scheme drastically improves everyone’s ability to form and carry out their plans. This is because social coordination, particularly around a scheme of basic rights and liberties, drastically reduces the uncertainty that usually accompanies evaluative diversity. Take the example of private property. Without any common understanding of a right to private property, people could still collect and store items. However, there is a much greater risk in doing so since one cannot predict – on the basis of a common understanding of the right of private property – whether others will attempt to take what one has collected. This problem is further magnified when thinking about the pursuit of long-term plans and projects, which often include the collection of various items along the way. The successful completion of a long-term project may depend on many smaller steps of collection and maintenance of items, but if one is quite uncertain whether the items she collected last year will still be in her possession next year, it may simply be imprudent to pursue the long-term project at all.

What the above discussion indicates is that social coordination has important prudential value. It makes sense, from a purely self-interested perspective, to grant to others certain basic
rights in order to secure those basic rights for oneself. In so doing, it becomes much easier to pursue one’s own life plans. Social coordination, particularly in the form of a scheme of basic rights and liberties, creates a background of stability that enhances everyone’s ability to pursue their own life their own way. Insofar as everyone is interested in pursuing their own life their own way, everyone has at least some reasonably strong interest in establishing a scheme of basic rights and liberties.

The value of social coordination is not merely prudential. First, most individuals believe their plans and projects are morally valuable. We do what we do because we think it is worth pursuing. And so, a framework which helps us pursue those projects also has moral value. Furthermore, a common social norm makes moral relations, among free and equal people, possible. Insofar, then, as members of the public view their fellows as free and equal people they are committed to establishing common social norms in many areas of life. Absent a common social norm, then not only is conflict more likely but there are no morally appropriate responses to that conflict; if there are no norms governing property, then when someone steals your property your resentment is inappropriate – it fails to regard the other as a free and equal person.

That social coordination is of both prudential and moral value helps us understand further why the presence of widespread disagreement does not imply anarchy. People are not just interested in society being organized in accord with their own worldview; they are also interested in living in a society with others. This interest follows from both the moral and prudential value of social coordination. But, more generally, as social creatures, human beings are driven to live in a society and so are motivated, to various degrees, to reconcile their differences to maintain a stable society. All public reason liberals understand members of the relevant constituency to
have two distinct moral motivations: to act in accord with her own evaluative standards and to act in accord with social norms that are embraced by others.\textsuperscript{187}

Individuals differ on the strength of their commitment to cooperation and of course on how they rank various options under consideration. Some individuals will stick to their preferred action or rule, even as a significant portion of society coalesces around an alternative; others, like Chris, will often join with the crowd, being strongly motivated to establish a common social arrangement or not being strongly committed to the norm she identifies as best. But, as work in evolutionary game theory has shown, as more people coalesce around a specific norm or rule, the dissenters have more reason to also join in. For instance, insofar as Barry does not want to eat alone, then if Aly hops on board with Chris’s recommendation of Indian, he has even more reason to accept that option than he did prior to Aly’s assent. This implies that even those who are strongly committed to an alternative norm or rule, or are not terribly motivated to reconcile, can even be brought on board as more members of society begin to coalesce.\textsuperscript{188} Thus, the presence of wide ranging disagreement about what is best, which could perhaps set people at odds, is offset by their motivation to live together in a society.

2.3. \textit{Vindicating Liberalism}

Members of the public are understood to be interested in living in a society with other free and equal persons; this motivates them to seek reconciliation in cases of disagreement, even if that means living in accord with a common norm which they do not identify as the best option. Moreover, given the starting point of public reason liberalism – the freedom and equality of all

\textsuperscript{187} Gaus, 398–99.
\textsuperscript{188} Gaus, 409–23.
persons – and the understanding that rejecting a common norm on a matter implies being willing
to forgo coordination on the matter entirely it will often be the case that members of the public
have sufficient reason to accept a variety of norms on a given matter. Together, this means that a
diverse society can often find a common norm for an important matter which all have sufficient
reason to accept. It is therefore possible to reconcile the status of persons as free and equal with
the exercise of common authority.

This reconciliation is particularly plausible in the context of the core liberal institutions.
Core liberal institutions, such as schemes of private property and rights to privacy and freedom
of expression “economize on collective justification.” Rather than seeking a substantive
common viewpoint in the face of increasing diversity, liberal institutions only require a minimal
common agreement – that within certain realms the evaluative standards of the individual are
authoritative. Thus, rather than having to forgo acting in accord with one’s own conception of
the good, in order to live in society, liberal institutions secure significant protections for those
pursuits.

In sum, convergence public reason liberalism does not risk full anarchy. Enoch is
incorrect to infer from the claim that “everything is controversial” among members of the public
to the conclusion that “nothing can be justified”. It is precisely the fact that (nearly) everything is
controversial among those living in a modern pluralistic society that grounds the justification for
liberalism.

189 Gaus, 374.
3. Abstraction, Social Coercion, and the Min-archy Objection

For many critics of convergence public reason there will be little solace in showing that it can vindicate core liberal institutions. For these critics, whether they are consensus theorists or general critics of the public reason project, it is important that certain core elements of the modern liberal state are legitimate. These theorists tend to be opposed to libertarianism and favor various redistributive and welfare schemes and believe that at least some versions of such schemes must be legitimate in a diverse society. And so, on their view, even if convergence public reason can vindicate core liberal institutions, if it makes libertarians effective “dictators”, that is still reason to reject it.\(^{190}\)

My response to this min-archy or libertarian dictator objection is twofold. First, I argue that Enoch’s claim that “everything is controversial” among moderately idealized members of the public is actually false. There are some shared ideas, most notably the perspective of agency, and this shared perspective generates strong reason to favor certain sorts of welfare protections. Second, I emphasize the “wide” element of (some) convergence models and argue that by taking social coercion seriously we can make sense of the potential legitimacy of various social justice movements. Thus, my overarching claim is that two key aspects of modern liberalism, positive welfare protections and a commitment to social justice, can be vindicated through convergence public reason. Now, importantly, this does not mean that just any welfare or social justice policies will in fact be legitimate. Rather, it means that such policies are not obviously ruled out and that a good public reason case can be made for such policies in the abstract.

\(^{190}\) A. Lister, “Public Justification and the Limits of State Action,” *Politics, Philosophy & Economics* 9, no. 2 (2010): 151–75. Lister was the first to name this objection a “Libertarian Dictator” objection.
3.1. Agency, Redistribution, and Welfare Liberalism

Each member of the public has his or her own plans and projects, which are partly determined by their conception of what makes for a good human life (which includes their conception of morality more generally). Because in a pluralistic society we regularly run up against different ways of living, and our own way of living is challenged and open to revision, we all cannot help but understand ourselves as deliberative agents.\(^{191}\) Thus, as Gaus suggests, despite our significant disagreements, we all share in the perspective of agency. By this he does not mean we view ourselves as “autonomous” agents in any thick sense, but simply that we all see our “actions as following from [our] own deliberations” even if those deliberations are “unreflective, traditional, or superstitious.”\(^{192}\) Insofar as we view ourselves as naturally free, we accept that we are agents. Whether we embrace the sort of individuality Mill advocated for or defer to authority, we are deliberating (at least in a thin sense) about how our lives should go and making choices based on those deliberations. All people, at the level of moderate idealization, can be understood to share this perspective of agency – they all view themselves as agents, even if they disagree about everything else. This follows quite naturally from the starting point of public reason – that all persons are free and equal – and from recognizing that the whole enterprise of requiring justification assumes that the individual is an agent. If an individual is not an agent, if her actions do not follow from her own belief-value set, her own deliberations, her own choices, then there is simply no reason to worry about justifying coercion for her. It is because coercion, when unjustified, aims to usurp the authority of the individual agent that it must be justified. In this way, it is simply not possible to escape the perspective of agency.

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\(^{191}\) Gaus, *The Order of Public Reason*, 337.
\(^{192}\) Gaus, 338–39.
This shared perspective of agency forms the basis, in the convergence tradition, of the justification of the core liberal institutions. Indeed, that people viewed themselves as agents was simply assumed in my previous defense of liberal institutions. But the appeal to the perspective of agency does more than this. It is from this non-controversial shared perspective that we can begin to generate other core elements of the modern liberal state. Now, importantly, that all members of the public can be understood to share this perspective, and therefore to share the set of reasons which that perspective generates, does not mean that they will always come to the same conclusions about matters where those reasons are relevant. This shared perspective sits aside various unshared perspectives, and although the shared perspective of agency generates very strong reasons – given its centrality to all other elements of an individual’s belief-value set – those reasons still must compete with the reasons generated by various other commitments each individual has. Nonetheless, identifying the sorts of reasons the perspective of agency generates, the sorts of coercive social arrangements those reasons supports, helps us understand how certain features of the modern liberal state can be legitimate.

Consider, most centrally, claims about welfare. A distinguishing feature of modern liberal societies is a commitment to the welfare of citizens. Indeed, what distinguishes a (modern) liberal society from a libertarian one may just be a commitment to securing and promoting the welfare of citizens. From the shared perspective of agency we can begin to see how the eligibility of welfare protections becomes possible. An individual’s ability to realize her agency can be impugned in all sorts of ways, including through starvation and ill health. As such, a commitment to one’s own agency will lead one to endorse some basic welfare rights. As Gaus

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193 Rawls implicitly suggests this distinction when he defines a libertarian theory as holding “that only a minimal state limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified”. Of course welfare protections are not the only sort of policies not included in this list, but for modern liberals they are often the most important element missing from libertarian theory. Political Liberalism, 2005, 262.
claims, “Members of the Public, aware only that they are agents, and of their reasons to maintain their agency and to be successful as agents, would insist not only on the freedom to pursue their agency but also the necessary means.”

Effective agency is the ability to successfully achieve one’s ends and requires more than mere non-interference. This is a position some libertarian thinkers explicitly endorse, and is a position that all can be understood to hold under moderate idealization. That is because if one views oneself as an agent, and recognizes that one’s agency is central to everything else one values – for one cannot successfully pursue any plans or projects if one’s agency is eliminated – then one always has strong reason to preserve and even enhance her agency. In this way, everyone will be committed to basic welfare provisions.

The exact nature of those welfare provisions, however, is indeterminate. The shared perspective of agency provides but one set of reasons in favor of welfare schemes. Other, diverse considerations, such as desert, may count against certain sorts of welfare schemes. And, of course, the strength of one’s concern with state coercion may alter one’s rankings of various welfare proposals, and render some illegitimate. Nonetheless, at the level of moderate idealization all members of the public have some reason to support welfare protections, despite what an examination of actual political discourse may suggest. We may doubt this when we consider the libertarian, who insists on very strong rights to private property and suggests that any sort of taxation or redistribution amounts to theft. However, as I have suggested above, the idealized libertarian would likely still support some basic welfare protections insofar as such protections preserve effective agency. Moreover, it is worth remembering that even the

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The public justification of a scheme of private property is inextricably linked to a discussion of welfare rights and the distribution effects of that scheme of private property.\footnote{John Stuart Mill, *The Collected Works of John Stuart Mill, Volume II - The Principles of Political Economy with Some of Their Applications to Social Philosophy (Books I-II)*, ed. J. M. Robson (Toronto: University of Toronto Press, 1965), bk. II; Corey Brettschneider, “Public Justification and the Right to Private Property: Welfare Rights as Compensation for Exclusion,” *The Law & Ethics of Human Rights* 6, no. 1 (January 6, 2012), https://doi.org/10.1515/1938-2545.1070; Gaus, *The Order of Public Reason*, 522.} This makes sense given that it is the shared perspective of agency which justifies both abstract private property rights and abstract welfare rights. But this implies that as members of the public rank the various options related to private property rights, they are also considering potential redistribution or welfare schemes. For some members of the public, an extensive scheme of private property rights with only minimal provision for the poor will be understood as exceedingly coercive, so much so that the costs outweigh the benefits and thus such a scheme is outside that member of the public’s eligible set.\footnote{Gaus, *The Order of Public Reason*, 507, 526; Brettschneider, “Public Justification and the Right to Private Property,” 132–35.} Even those citizens who claim that taxation is theft will end up identifying at least some redistributive schemes as eligible, insofar as they are connected to the protections of private property. For if they did not they would be giving up on all that is good about private property protections.

It is crucial here to remember how the eligible sets of proposals are constructed: The question is always would this proposal on the matter be better than no coordination at all. And so, given the libertarian’s deep concern with the protection of property rights, we can see that...
when the alternative is no protection for private property, everyone is likely to have sufficient reason to endorse some redistributive schemes. And so, while the sort of extensive schemes of redistribution advocated by some egalitarians may be ineligible, given the high level of coercion involved, a wide variety of redistribution schemes could be publicly justified.

3.2. Social Coercion and Social Justice

The forgoing discussion of welfare rights and redistribution can be understood as part of a broader concern some may have with convergence public reason: that it cannot justify the sorts of social justice policies that many contemporary progressives advocate. Policies relating to the welfare of the poor are but one subset of concerns we may have in society. We may also be concerned with the protections of various vulnerable populations and so advocate for anti-discrimination policies. And yet some in our society have suggested that anti-discrimination and related civil rights policies, including the landmark Civil Rights Act, are instances of unjustified coercion. The claim here is that such protections involve coercing private citizens, or privately held businesses, to change their practices in ways incompatible with their personal commitments. Requiring businesses to serve people regardless of race, for instance, coerces business owners because it tells them they must act in a certain way or risk punishment. More generally, the worry may be that anti-discrimination policies are unlikely to be publicly justified and so even if convergence public reason doesn’t risk anarchy, it risks what many would identify as a significantly unjust society.

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198 Both Rand and Ron Paul have said things to this effect. See, e.g., http://www.courier-journal.com/videos/opinion/2014/07/09/12376813/
This sort of concern is well-founded if applied to certain versions of the convergence view. If only laws, or state-based coercion, stand in need of public justification, then it does make it difficult to justify anti-discrimination policies.\(^{199}\) For instance, policies which make it illegal to refuse service to people based on race, or sexual orientation, are straightforwardly coercive. Indeed, some of those who have objected to such policies have objected on the basis that such policies are excessively coercive.

But here the remedy for the problem is to recognize that it is not just state-based coercion that stands in need of justification. Neither Rawls nor Gaus restrict the principle of public justification to state-based coercion. Similarly, following Mill’s insight that social tyranny can be just as great of an infringement on individual liberty as state tyranny, the Wide Asymmetric Convergence model expands the scope of public justification to social coercion as well. And in so doing, we can take account of many of the social justice concerns that may otherwise worry us.

State-based coercion can be a remedy for informal social coercion. In this way, state-based coercion can provide a net reduction in coercion.\(^{200}\) Anti-discrimination legislation is one example of this, but other “social justice” causes may also be plausibly understood as calls for the state to take coercive action to reduce or eliminate unjustified social coercion. Here, the right way to understand the situation is that (at least) those who are being (for instance) discriminated against by way of various social norms do not have sufficient reason to endorse that social justice

\(^{199}\) This is a problem, for instance, for Kevin Vallier’s initial convergence view, especially with its strong emphasis on freedom of association and the resultant implications for refusing service and entry. In *Liberal Politics and Public Faith*, he restricts his focus to “laws”; however, in his forthcoming book, *Must Politics Be War?: In Defense of Public Reason Liberalism*, v 1.0 (Oxford University Press, forthcoming), he expands the scope of public justification in the way I suggest here.

\(^{200}\) I make this argument in “Legitimacy in a Diverse Society” §1.3
coercion. The social coercion of discrimination can come in various forms, but often involves norms which limit opportunities and access for certain groups of people and is backed by the threat of social sanction or violence. For instance, informal segregation involves social norms which restrict where certain people may go. That there already exists social coercion for a given issue alters the coercion costs of state-based intervention. The mistake some self-proclaimed liberty-loving politicians make, in rejecting anti-discrimination legislation, is to view the situation without the legislation as a state of non-coercion (regarding the relevant issue). It is not a state of non-coercion; it is just that they are not the ones who are being coerced.

3.3. The Modern Liberal Welfare State

The modern liberal state does much more than merely protect private property rights. While we should not think that all that the modern liberal state does is justified, we may also reasonably worry that a view of political legitimacy which vindicates only the minimal state has got something wrong.201 The various welfare institutions of the modern liberal state do not seem obviously illegitimate, and so it should at least be an open question whether, in any given society, they – or other versions of them – can be justified.

The forgoing arguments vindicate the possibility that some of the intuitively legitimate and important work the modern liberal welfare state does can be justified within convergence public reason. This is because, first, it is not the case that “everything is controversial” among moderately idealized persons. We can abstract from our differences to identify what Gaus calls the shared perspective of agency, and many of the conclusions we draw from that abstract

perspective will be stable under full justification – they will still hold once we step out of the abstraction. Further, many of those who level the min-archy objection are progressives who are particularly concerned with the plight of underprivileged people. The worry is that little if any assistance for the poor will end up justified, and that government action to reduce or eliminate social discrimination and institutional prejudice will be illegitimate. I have suggested this fear is unfounded; a model of convergence public reason which extends the scope of public justification to social coercion can make sense of the justifiability of anti-discrimination legislation. Moreover, there is an inextricable link between the justification of private property rights and welfare rights; it is likely the case that only private property schemes which do a reasonable job of compensating those in need will be publicly justified.\textsuperscript{202}

A vindication of core liberal institutions over anarchy and of something approximating the modern liberal welfare state rather than the minimal state, should render the min-archy objection toothless. In the vast majority of cases where we may want to forgo public justification in the name of justice – we do not think we need to justify anti-racism policies to the racist – a model of convergence public reason can make sense of how we can have both public justification and justice.

4. Beyond Min-archy: The Order of Justification, Accommodation, and Exemption

The final version of the anarchy objection accepts that convergence public reason can vindicate the legitimacy of core liberal institutions, and even important institutions of the modern liberal welfare state, yet suggests that when it comes to other matters – the sorts of matters that consume

\textsuperscript{202} Brettschneider, “Public Justification and the Right to Private Property.”
much of our legislative and political debate – things will be hopeless. Actual political debates over infrastructure policy, science policy, foreign policy, environmental policy, and more are often quite divisive. Here the objector suggests that either on these sorts of matters nothing will ever be justified or at least it seems impossible to justify intuitively legitimate sorts of arrangements. One particularly contentious example would be healthcare policy. Given what I have said above regarding welfare rights, some aspects of healthcare may be publicly justified, but certainly a great deal will be open to more low-level political debate. For instance, questions over whether government-funded or employer-funded healthcare should be required to cover birth control do not seem to obviously be resolved by abstracting to the perspective of agency or relating rights of private property to basic welfare considerations. And so here, the objector may suggest, is where the real objection lies: there will be a great deal of what Rawls called ‘mere legislation’ which simply will not be resolved because someone will always have a defeater for every option.

In order to respond to this intuitive anarchy objection, I consider two ways we may deal with these sorts of political controversies. One is to appeal to those sorts of political considerations, such as basic rights and liberties, which are publicly justified in order to craft a set of eligible proposals. Alternatively, such an appeal may show that although no solution can be found, the cost is not very high. The second way we may deal with such controversies is to make use of methods of exemption and accommodation. These approaches can allow for broadly justified policies to be adopted against reasonable objection by exempting or otherwise accommodating those with reasonable objections. This approach, which has a long history in liberal policymaking, can help to alleviate the lingering concern that a convergence public reason approach to legitimacy leaves society held hostage to the few dissenting voices.
4.1. The Order of Justification and (Objectionable) Anarchy

There are some political and social matters which are more central to the functioning of a society than others. Certain protective functions, for instance the protection of individuals against violence or other violations of their basic rights, are generally considered a necessary feature of a functioning society. Other matters, such as the construction of parks, may be desirable but are clearly not necessary. Various figures in the history of political philosophy have recognized this distinction. John Stuart Mill distinguishes between “necessary” and “optional” functions of government, where necessary functions are those which are “inseparable from the idea of a government, or are exercised habitually and without objection by all governments.”

Optional functions, on the other hand, are those which some governments may do and others may not, and which are much more open to political debate. The economist James Buchanan drew a similar distinction between the “protective functions” of the state and the “productive state”. Here, the protective functions are those essential to even a minimal state, such as protection against rights violations and arbitration in case of such violations. While any well-functioning state includes certain productive features as well, such as the building of infrastructure, the determination of which productive functions the state should engage in, and how, is more open to political debate. On Buchanan’s view, echoing Rawls’s distinction between “constitutional essentials and matters of basic justice” and “mere legislation”, whereas the protective functions of the state must be unanimously justified, productive functions may be justified by other, less stringent means.


In the convergence public reason tradition, the parallel distinction is between those functions of government which are “necessitated by the abstract rights or moral claims of citizens” and those that are not. Leaning on this distinction, we can also say that those social and government functions which relate to fundamental rights and liberties are basic in “the order of justification.” Such issues, which includes basic economic and political rights and liberties, are considered prior to other issues and come to form the background for consideration of further issues. Rawls leaned on this way of understanding things as well, for his defense of not requiring matters of mere legislation to be decided in accord with public reason was that so long as everything “upstream” – that is, the constitutional essentials and matters of basic justice – was publicly justified, which included the decision procedures for matters of mere legislation, then there was no risk that such downstream issues could impugn the most important aspects of a person’s life.

This order of justification is significant for considering the force of the intuitive anarchy objection. What I have suggested above is that we need not fear anarchy when it comes to the necessary or protective functions of the state. We may not consider whether convergence public reason would render illegitimate (parts of) the productive state. But such considerations must occur against the background of established liberal rights and liberties; the “state of nature” baseline for mere legislation is one of established private property and welfare rights as well as various liberties. This has two effects on consideration of legislation: first, it allows us to appeal to the settled rights and liberties to justify legislation; second, it may reduce the opportunity cost to forgoing legislation on a given matter.

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206 Gaus, 275.
I previously argued that anti-discrimination legislation could be justified because it reduced overall coercion, by reducing or eliminating unjustified social coercion. Another way we may go about justifying anti-discrimination legislation, especially if it is the government doing the discriminating, is by appealing to the established basic rights and liberties. For instance, we may claim that refusing to hire someone based on race or religion, or paying someone less simply because they are female violates, for instance, “basic principles of equal liberty to pursue an occupation of one’s own choice.”\textsuperscript{207} We are claiming that such principles are more basic than whatever the basis of the discrimination is, and if such principles are already established then nothing that occurs “downstream” can (legitimately) violate them. Of course, sometimes a downstream debate brings into conflict two basic rights or liberties and then an important part of the debate is over which is more fundamental. But even in this case the context of the debate is an appeal to prior fixed points to help settle a downstream issue. The upshot, then, is that various social justice or other progressive movements which may seem impugned by the convergence model, since an examination of the actual debate would suggest that not everyone has sufficient reason to endorse the cause, should be understood as attempts to use more basic rights and liberties to establish the justification of downstream issues. This does not imply that in every case they will win – objectors may appeal to other basic rights – nor that they are correct in their extensions. But, insofar as they are correct about the basic right or liberty, then every moderately idealized citizen will have some very strong reason to favor the extension.

In other cases, it will be true that a convergence view will suggest that legislation on a matter is unjustified – that there are no socially eligible proposals and so the only legitimate situation is one of “anarchy” (on that given matter). There is a presumption against coercion,\textsuperscript{207} Gaus, 317.
after all, and insofar as all political action is coercive, there will still be plenty of matters where the benefits of government action do not outweigh the costs of coercion, at least for some members of society. But here we should keep in mind that a failure to coordinate on some legislative matter occurs within the background of established rights and liberties. The opportunity costs, then, of forgoing a common authority on the matter is not as great as we may sometimes believe. This significantly diminishes the force of the anarchy objection in these cases – sure, there will be no common law on the matter, but this isn’t particularly disastrous.

As an example, consider calls for legislation that makes it a criminal offense to dump pollutants into rivers and streams. One may suggest that such legislation is important to de-incentivize potential polluters. Indeed, we may claim that absent such laws all our streams and rivers will become toxic. That would certainly be disastrous. But, reflection on the order of justification should challenge how we are thinking about the issue. Lack of government regulation of polluting may very well be problematic if there were no other means of de-incentivizing polluters. But with the background of a private property regime, where various individuals or corporations own patches of the waterways, established rights provide a means to hold polluters accountable. The threat of legal action, and the fines that may come along with losing such a case, could potentially check against dumping in the streams and rivers, in much the same way that the threat of government prosecution could. This, of course, is not to say that there would be no benefit to the additional legislation; rather, it is simply to suggest that how much of a benefit the legislation provides varies with whether we have in mind established rights to private property.

208 John Hasnas discusses the privatization approach in contrast to the legislative approach of dealing with environmental issues in John Hasnas, “Two Theories of Environmental Regulation,” Social Philosophy and Policy 26, no. 02 (July 2009): 95, https://doi.org/10.1017/S0265052509090189.
Reflection on the order of justification, an idea central to all public reason views, and indeed to all theories of moral and political orders, thus reduces the force of the intuitive anarchy objection. An inability to pass legislation on a given matter does not mean chaos in society, since consideration of legislation occurs in light of established rights and liberties. In this way, we should understand the public justification of basic rights and liberties to be ‘insulated’ from the justification of mere legislation; lack of justification in the latter domain does not imply lack of justification in the former. And this is important to understand, since much of the actual political debate that we see is over matters of ‘mere legislation’; the debate is not commonly over whether we should or should not have a right to free expression or private property. This makes politics look hopeless, and primes people to believe that if every law needs to be publicly justified, then the result will be anarchy. But the vast majority of those disagreeing in the political sphere are maintaining the same fixed points in the moral and political order. Of course, it is common that our debates over mere legislation will invoke the basic rights and liberties – we may claim, for instance, that everyone has a right to healthcare and so that is relevant to healthcare legislation. But the central point is that there is still a core set of rights and liberties which are held fixed by everyone and so we should not let our time spent watching cable news convince us that if everything must be publicly justified, then anarchy will result.

210 The idea that some disagreements are or are not insulated from others goes back to Thomas Hobbes and John Locke. Hobbes believed that religious disagreement would infect all civil life. In effect, he held that disagreement anywhere would lead to disagreement everywhere. Locke, alternatively, thought we could insulate religious disagreement from civil matters; thus he embraced religious freedom because the idea that members of a society would perpetually disagree about religion did not threaten their ability to live together in civil society. See, e.g., Thomas Hobbes, *Hobbes’s Leviathan Reprinted from the Edition of 1651 with an Essay by the Late W.G. Pogson Smith* (Oxford: Clarendon Press, 1909); Gaus, “Public Reason Liberalism.”
4.2. Implementing Defeated Legislation: Exemption & Accommodation

When considering matters of the productive state – matters of mere legislation as Rawls put it – we should be willing to accept that sometimes the state will not be able to legitimately act and this does not spell disaster, for we still have those core rights and liberties which are essential to our pursuit of our life plans. But, other times, there may be some action the state could take which is widely supported, but which some members of society do not have sufficient reason to endorse. In these cases, our concern may be that society will be held hostage by an idiosyncratic few and that seems unfair. Why should those with unusual, often quite extreme (relative to the general public) views be able to prevent the rest of us from reaping the benefits of some law that we all endorse?

I agree that if a select few were to hold society hostage to their idiosyncratic views, that would be presumptively unfair. The good news is that liberal societies have a long history of dealing with such situations, and they have a reasonably good system for dealing with them: the use of legal exemptions and accommodations. These are means by which a beneficial, widely supported law may still be implemented despite some claiming that such a law is unacceptable. Recently, Kevin Vallier has developed a theory of exemption and accommodation within the convergence public reason framework. Now, importantly, not all legislative matters will be open to exemption or accommodation. So, what I discuss here is a general sketch of how we may go about dealing with some legislative controversies that do arise. Insofar as this approach can

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211 Lister’s “libertarian dictator” concern could be understood in this way. Also, this is perhaps how we may understand many peoples’ concerns over allowing religious reasons to function in public justification. Their concern is that religious citizens will hold society hostage to their idiosyncratic religious beliefs. For Lister’s argument see Lister, “Public Justification and the Limits of State Action,” 2010. It is Gaus who calls it the “libertarian dictator” argument. See Gaus, The Order of Public Reason, 501.
successfully deal with at least some of the concerns of those who level the intuitive anarchy objection, then that should leave the objection much less powerful.

The basic framework for exemptions and accommodations is simple. We can contrast a generally applicable law, $L_1$, with a closely related law, $L_2$, which makes the law applicable to nearly everyone in society but exempts the group of people who do not have sufficient reason to endorse $L_1$. Those with defeaters for $L_1$ will not have defeaters for $L_2$, while those who already had sufficient reason to endorse $L_1$ should still have sufficient reason to endorse $L_2$. On this basis, then, $L_2$ is a Pareto improvement over $L_1$ – it is worse for no one and better for some. In such a case, $L_2$ is the appropriate law to pass. Of course the key here is that the benefits of $L_1$ are not (substantially) reduced by shift to $L_2$, because if they are then it may not be the case that those who have sufficient reason to endorse $L_1$ would still have sufficient reason to endorse $L_2$.

There are, broadly speaking, two methods of accommodation. The first is typified by the how the United States handles conscientious objection to the military draft; anyone may petition the government for the exemption to the generally applicable law. These are general exemptions and Vallier suggests that they are well placed to handle cases where the individuals who object to the generally applicable law are dispersed, not necessarily the part of a single identifiable group, and may vary over time.\textsuperscript{214} The second method of accommodation, targeted exemptions, pre-determine the group(s) that will be exempted.\textsuperscript{215} The 1919 Volstead Act is a prime example, for it exempted religious groups that use alcohol in their ceremonies from the general prohibition on alcohol.

\textsuperscript{214} Vallier, 18.
\textsuperscript{215} Vallier, 17.
The United States has been quite successful in using exemptions to maintain generally applicable and (sometimes) beneficial laws against strong moral objection from certain groups and individuals. But, there are important constraints on when exemptions are workable.\textsuperscript{216} First, as already assumed, to even consider passing the law while providing exemptions, it should be the case that a substantial majority of the members of society have sufficient reason to endorse the law; if not, then the proper response is to not pass the law at all. A further consideration for the plausibility of the exemption is that providing the exemption cannot impose substantial costs on other parties.\textsuperscript{217} There is no algorithm for determining what constitutes a substantial cost, but Vallier offers two contrasting examples. On the one hand, Sikhs are exempted from UK motorcycle helmet laws since they are religiously committed to always wearing a turban. Given the small number of Sikhs, and the overall impact of them not wearing a helmet, this is an example of an exemption that does not impose significant costs on other parties. Alternatively, vaccine exemption may impose significant costs on other parties, both in terms of potentially putting others in danger and in terms of actual financial costs, as those exempted may freeride on the herd immunity that results from others paying for and receiving vaccination.\textsuperscript{218} Although we can generate no general rule about when an exemption imposes significant costs on others, we can draw out a general rule about what sorts of issues are likely excluded from exemption and what sorts are susceptible to it. Generally speaking, we can say that the possibility of exemptions is focused on issues that come later in the order of justification. We cannot exempt people from

\textsuperscript{216} Vallier, 3.
\textsuperscript{218} For a detailed discussion of the issue of vaccine refusal and exemption see Mark Navin, \textit{Values and Vaccine Refusal: Hard Questions in Ethics, Epistemology, and Health Care}, 1 edition (New York: Routledge, 2015).
respecting others’ basic rights, as that would be clearly be a significant cost, but we can exempt people from the draft or sending their children to high school.

Not all cases of accommodation will be straightforward. There will, of course, be debate over whether individuals or groups merit the exemption – whether the law truly does infringe on their liberty of conscience or imposes “substantial burdens”. There will also be debate over whether providing the exemption imposes significant costs on other parts of the population. Indeed, these were some of the concerns raised in the recent Burwell v. Hobby Lobby Stores, Inc. case. But the framework for accommodation fits well with the convergence public reason approach – it is another means by which we can reconcile common authority with the status of people as free and equal. In particular, it is a means by which we take seriously the basic liberal commitment to liberty of conscience. The idiosyncratic objections of a select few in society need not hold all of society hostage; a liberal order provides the means to reconcile the commitments of both the supporters and opponents of the law.

5. Conclusion

In the previous chapter I argued that the commitments that underwrite public reason liberalism should lead us to endorse the Wide Asymmetric Convergence model of public reason liberalism. But, that model, like other convergence models, seems to be open to a significant objection: it sets too high of a bar for public justification, one that could (almost) never be met, and so the result is that no coercive social arrangements would be legitimate; the result would be philosophical anarchy.
This chapter has focused on responding to the anarchy objection to convergence models of public reason. Even accepting the claim that among moderately idealized members of society, everything is controversial, I argued that the result is not anarchy, but a justification of the core of liberalism – basic rights of agency such as private property, freedom from harm, and privacy. Even further, we could see the potential for vindicating some aspects of the modern liberal welfare state, since it is not the case that everything is controversial (among Members of the Public) and that everyone has sufficient reason to endorse some basic abstract welfare rights. Exactly what policies these rights lead to is inconclusive, but I argued that the result would not be a mere minimal state and that some degree of redistribution is eligible.

Once we have established the central work of the modern liberal state – protection of basic rights and provision of basic needs – the anarchy objection loses much of its force. Even if we could not achieve agreement on a variety of other legislative matters, we would still have quite a lot of coordination around important social and political issues. Sure, that means convergence public reason cannot determinately justify property-owning democracy or single-payer healthcare, but to think it must is to let the tail wag the dog. Nonetheless, as I suggested in the last section, there is still more to be said for the justifiability of mere legislation. It can be justified by its ability to make (more) effective basic rights and liberties or it can be justified in the face of opposition by way of accommodation. The fear of an ideological dictator holding society hostage to his idiosyncratic beliefs is ill-founded.
CHAPTER IV. THE PUBLIC REASON CASE FOR ANIMAL GUARDIANSHIP

The previous chapters have aimed to establish and defend a model of public reason liberalism, that allows us to evaluate the legitimacy of coercive social arrangements in a diverse society. With that model in hand, we are now in a position to investigate one of the central aspects of the political turn in animal ethics – the rejection of the property status of animals. While eliminating the property status of animals may not be sufficient to achieve justice for animals, it is widely agreed that elimination of that property status is necessary. To that end, my focus here will be on two related questions: Is the property status of animals politically legitimate?; if not, what is the politically legitimate legal status for animals? The core of my argument is this: some members of the public have defeaters for some property rights over animals, particularly those that define animals as things that can be owned. If we eliminate these illegitimate property rights, what we are left with is what is most appropriately called a legal guardianship relation – a relation that includes certain ‘property’ rights, but combines the exercise of those rights with an obligation to act for the sake of the animal. While I do not suggest that this legal guardianship relation is the only eligible legal status – for recall that public reason rarely gives us a determinate answer – my claim is that it is the nearest eligible legal status to what we currently have. Other potential statuses, such as regarding animals as full legal persons, would involve more than merely eliminating existing illegitimate legal protections.

I will begin this investigation with an extended examination of the place of property rights in a public reason framework. This is important to establish both why the property status of animals is open to a public reason analysis and how that analysis should work. I will then turn to examine the standard animal property debate, particularly as found in the recent turn literature.
This will include discussion of Alasdair Cochrane’s recent criticism of arguments against the ownership of animals, for his criticism depends, in part, on making the precise sort of theoretical move that is essential to a public reason analysis of the legal status of animals.

1. Property and Public Reason

Property rights have historically held an important place in liberal political theory. Locke, for instance, placed among the natural rights the right to property; Kant, similarly, suggests that civil society is impossible without recognizing the rights of property. Despite this history, however, many contemporary public reason liberals have downplayed the significance of property rights. Rawls and Rawlsians, in general, have said very little about property rights. As a result, there has been little work coming out of the consensus public reason camp on the justification and place of property rights in a just and legitimate liberal society. On the other hand, convergence public reason liberals – most notably Gerald Gaus and Kevin Vallier – have recognized the centrality of property rights to a publicly justified liberal polity. Gaus, in particular, has developed a reasonably detailed account of the justification for, and place of, property rights within a diverse liberal society.

Many liberal theorists have attempted to justify private property regimes by appeal to a natural right to property. Whatever the general success of these arguments they cannot, by themselves, publicly justify a private property regime. Given that not all members of the public accept that there are any natural rights, and even if they do they disagree about what they imply, if private property regimes can only be justified by appeal to natural rights then such regimes will not be justified for all. Thus, public reason liberals hoping to make headway in the justification of private property regimes must turn to alternative approaches.
Gaus has offered one such alternative approach, which was discussed in the previous chapter, which we can call the *jurisdictional understanding* of property rights. In brief, given everyone’s interest in pursuing their own life their own way – the shared perspective of agency – and given the diversity of values, ends, and aims within a modern society – the fact of reasonable pluralism – everyone has strong reason to support the creation of personal jurisdictions, property rights being a core instance of a personal jurisdiction. These personal jurisdictions “economize on collective justification” by allowing “each a jurisdiction in which his values and ends hold sway and so minimizes appeal to collective choices among those who disagree on the ends of life.”

Property rights, then, resolve the conflict between liberty and authority by *devolving* authority.

The appeal to the perspective of agency, to everyone’s aim of living their own life their own way, can justify property rights without appeal to controversial claims about natural rights or even self-ownership, although such an approach is certainly compatible with these claims. Importantly, however, the agency-based justification produces a different view about the nature and extent of private property rights than some advocates of the natural rights or self-ownership approaches take their arguments to support. Nonetheless, the two major features of private property regimes that the agency-based approach highlights are features of any private property regime, independent of its justification. Those two features are (1) the coercive nature of private property regimes, and (2) the fragmentation of property claims.

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1.1. The Coercive Nature of Private Property Rights

On the jurisdictional understanding of private property rights, such rights are (for the most part) contractual rights: they are claims made on others to certain performances rather than claims over things.\(^{220}\) When I own a home, respecting my property claims involves deferring to my judgment on various matters such as who can make use of my home. My claims to property are essentially just claims on other people to act or not act in certain ways regarding various jurisdictions. My property claims, then, are coercive claims: I am demanding morally and legally protected limits to your freedom. This is even more obvious when we consider contemporary property regimes that include explicit State-based enforcement of property claims.

That a property regime is a social and legal nexus of claims and duties is important for understanding its place in the public reason framework. Because property rights place restrictions on individual liberty, they must be publicly justified. It is easy, initially, to think of property rights as non-coercive: if I claim a right to possess land, for instance, it might seem that this involves no coercion at all. I am not requiring you to possess land, after all, and so we may think that pushing for my right to own certain things is not a matter that stands in need of public justification. But, as the jurisdictional analysis makes clear, although a regime of private property rights does not coerce anyone into owning anything, it does limit individual freedom by making certain claims and imposing certain duties regarding what others do freely decide to own.

\(^{220}\) Gaus, 3–4.
1.2. The Fragmentation of Property Claims

The jurisdictional analysis of property rights also highlights the fragmentary nature of property claims. When I claim ownership over a computer, I am making a variety of claims regarding that computer. I am claiming that I am the final authority on who gets to use the computer, and whether there will be a cost for doing so; I am claiming that I am the final authority on whether that computer should be destroyed; I am also claiming that I am the final authority over whether that computer, as a piece of property, can be transferred to someone else. Ownership, therefore, is a bundle of claims, and the various elements of this bundle can come apart – they can be fragmented. That this is so has led some to suggest that property, as a legal or political category, is anachronistic and unimportant.\(^{221}\) While such a conclusion may be too strong, it is correct to assert that the fragmentary nature of property has important implications for how we understand property as a legal or political category.

The classic argument for the fragmentation, or “disintegration”, of property appeals to how the law actually functions with regard to claims of ownership and property. The law does not treat “property as a unified authority over objects”, partly because the authority has been fragmented, and partly because many of the things we claim to own are not objects at all.\(^{222}\) We must consider “ownership” of stocks, bonds, patents, and copyrights; more generally, the rise of intellectual property has changed the way the law understands and deals with claims of ownership. Additionally, in modern society it is both common and beneficial for “owners” to be able to fragment their claims in property, ceding certain property claims while maintaining others. In such a situation, the “thing-ownership” conception of property is simply unworkable;

\(^{222}\) Grey, 70.
thus, the thing-ownership conception has been replaced by the “bundle-of-rights” conception of property and ownership.

Gaus suggests that “the ‘disintegration’ of property is required by a concern for evaluative pluralism, as it allows individuals to secure those domains that best suit their understanding of what is important.”

Recall that the public reason case for private property draws on the shared perspective of agency: everyone is interested in being able to pursue their life goals their own way. But, per the fact of reasonable pluralism, peoples’ life goals will vary drastically, and so there may not be any “one size fits all” understanding of the rights one has over their property that fits with everyone’s life goals, or with every type of entity that can be owned. Sometimes, it will better fit someone’s life plan to maintain certain types of authority over something while ceding others. Consider, for instance, the relationship between the owner of a rental property and a property management company. The owner maintains certain rights over the property – for instance they are the final authority on the transfer of that property. But the owner also transfers other rights to the property managers – for instance, she may grant to the property manager the final authority of determining who can use (i.e., rent) the property. But once there are multiple entities each possessing certain property rights then property has become fragmented and determining “ownership”, as a unified concept, is either impossible or beside the point since it does not exhaust our actual question about legal authority.

So, reflection on modern legal systems as well as the public reason justification for private property regimes impels us to accept that “ownership” is not a monolithic concept.

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223 Gaus, The Order of Public Reason, 381.
Rather, there are a variety of property claims which can be bundled in a variety of ways. Tony Honoré provides the classic taxonomy of the “standard incidents of property”, which includes:

1. **Right of Use**, a claim right permitting one to use and forbidding others from interfering with the use;
2. **Right of Exclusion**, a claim right forbidding use by others absent consent of the right-bearer;
3. **Right to Compensation**, in the event that the property is used or damaged without consent;
4. **Rights to Destroy, Waste, or Modify**;
5. **Right to Income**;
6. **Absence of Term**, meaning the duration of claims is indefinite;
7. **Liability to Execution**, the property may be taken from the right-bearer as payment of debt; and
8. **Power of Transfer**, whoever holds the above rights may permanently transfer them to others.\(^{224}\)

An individual who is a “full owner” of a thing would be said to have each of these incidents. But, as previously noted, full ownership is much less common in the modern world than is generally assumed. Instead, we have multiple people (or corporate entities or the state) each possessing some of the incidents over the same entity. Some homeowners may transfer the right of use to renters, or forgo their right to modify by joining a Home Owner’s Association.

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It is also worth noting that a person may have some of these rights over entities without thereby being the owner. This fact will become important later, since a legal guardianship relation is one where a person exercises some rights over a living being and yet is not properly called an owner. For instance, parents have the rights to “use” their children and “exclude” others, yet parents do not own their children; similarly, a museum has the rights to compensation and income for a famous painting they house, but they cannot destroy the painting and are, arguably, not properly called “owners” of the painting. Importantly, one common thread that ties these two alternatives to ownership together is that the guardian (in the parent-child case) and the steward (in the museum-painting case) do not have the right to destroy the entity over which they have authority. Indeed, Kant suggested that the right to destroy was essential to the ownership relation, and the forgoing taxonomy of legal relations fits this by associating the right to destroy only with ownership and not the other possible relations.

The forgoing considerations also imply that a “right to property” does not necessarily imply “full ownership”. Indeed, both reflection on modern legal systems and the philosophical justification of private property regimes counts against regarding “full ownership” as either standard or desirable. A thorough-going commitment to respecting liberty, which undergirds the agency-based case for private property, also supports the fragmentation of property. As Gaus suggests, “liberty upsets full ownership,” for even if we start with everyone being a full owner, they will sometimes find it in their interest to transfer certain rights, and so ownership will inevitably become fragmented. The only way to prevent fragmentation is to significantly limit the sorts of liberties one may exercise over her property, but such extensive coercion is highly

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226 Gaus, “Property and Ownership,” 12.
unlikely to be justified in a diverse public. Thus, a commitment to evaluative diversity, and the theory of legitimacy that I have argued falls out of that, necessarily leads to the fragmentation of property claims.

The agency-based case for private property does not, in itself, imply a regime of full ownership. In this sense, the agency-based case does not imply a “strong” system of property rights. However, Gaus identifies two other dimensions along which a property system may be strong: (1) it may involve rights which are not easily overridden; (2) it may be “extensive”, allowing for property claims to be made over a wider variety of entities. For instance, a system that does not allow for eminent domain – the right of the government to expropriate private property for public use – would be stronger, in one sense, than a system that did allow for eminent domain. And this is the case independently of how many property rights one exercises over their private property. Similarly, a system which permits private property in capital is stronger, that is, more extensive, than a system which does not (all else being equal). And, again, this is independent of which specific rights can be exercised over that capital.

Gaus has suggested that the sort of private property regimes which would be publicly justified are those that are strong in the two senses just discussed, but not necessarily in the sense of implying full ownership. Given that the justification of private property is early in the order of justification, the rights established there will not be easily overridden. Moreover, Gaus suggests that due to the wide variety of personal projects, and more generally the fact of reasonable pluralism, it will be necessary to establish jurisdictions over just about everything.
1.3. Public Justification and “What can be Owned”

There are two further points to be made regarding public justification and debates over what can be owned and how: (1) Despite common claims to the contrary, a demand to “be left alone with my stuff” is indeed a coercive demand; it is a request to be protected from interference with the expression of a variety of property rights. (2) That the burden of justification lies with the initiator of coercion. Both of these claims can be brought out by discussing Vallier’s argument that economic libertarianism will fall outside the optimal eligible set – that it will not be a candidate for a publicly justified economic order. To make this argument, Vallier suggests that we understand (economic) libertarianism as including two central commitments:

(1) A person can acquire “full property rights” over legitimately acquired property; and

(2) There are few, if any, limits on the sorts of “items” that a person can come to own.\footnote{227 Vallier, Must Politics Be War?: In Defense of Public Reason Liberalism, 389.}

In terms of the dimensions of strength discussed above, libertarians support a private property regime is that maximally strong across the first and third dimensions, or as Vallier suggests, libertarianism is “the support of capitalism, defined as the economic system that allows persons to acquire the maximal set of legal incidents over a maximal set of items.”\footnote{228 Vallier, 389–90.} Vallier does not discuss the strength of property claims viz. overriding claims (the second sense of strength), but libertarians tend to support a maximally strong regime on this front as well, claiming that nothing could justifiably override a person’s property rights.\footnote{229 Gaus, The Order of Public Reason, 377.}

Vallier’s rejection of libertarianism emphasizes that in a diverse society many citizens will have defeaters for the norms that fall out of commitment (1).\footnote{230 Vallier, Must Politics Be War?: In Defense of Public Reason Liberalism, 390–93.} That is to say, some citizens
will have defeaters for the establishment of the maximal set of legal incidents over (some) property, largely based on appeal to the importance of effective agency and the implications for those claims on basic welfare. These defeaters are relevant because, as Vallier argues, the advocacy of (1) is an advocacy of coercion – it is suggesting that the various rights which make up a scheme of “full property rights” be coercively enforced by some entity or entities. And, if we reject – as we must in a diverse society – any claim to a thick and substantive “natural right to property” (which some libertarians advocate) then when a libertarian is demanding protection of her property rights, she is requesting coercion. That means that this coercion must be publicly justified, but for reasons discussed in the previous chapter, the sort of private property regimes advocated by most libertarians would deny at least some people the ability to exercise their agency, since some basic material conditions must be met. Basically, if people can come to have the maximal set of property rights over the maximal set of entities, they could effectively buy up all the goods in the society and thus strangle those with nothing. Without some sort of guarantee against such a situation – such as the guarantee of basic material needs – some members of the public will reject such a regime.

Regardless of the success of Vallier’s rejection of libertarianism, it draws our attention to the two important features of a public reason analysis of property claims mentioned earlier:

(1) Despite common claims to the contrary, a demand to “be left alone with my stuff” is indeed a coercive demand; it is a request to be protected from interference with the expression of a variety of property rights; and

(2) That the burden of justification lies with the initiator of coercion.

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231 This rejection of libertarianism is further bolstered by arguments made in the previous chapter (“Does Convergence Public Reason Risk Anarchy?”) regarding effective agency and the justificatory dependence of private property and social welfare regimes.
The first feature has already been discussed, but it is useful to reconsider it in light of the second feature. This is because, as Vallier suggests, it is the libertarian – or the person saying “leave me alone with my stuff” – who is initiating coercion. The libertarian is asking for coercive enforcement of the various incidents that comprise full ownership. This means that the libertarian’s proposal must be justified for other members of society, including, e.g., “progressive egalitarians” and those impressed by Marx’s critique of capitalism. Vallier’s argument is that the libertarian property regime will not be justified for such people. But centrally, for my purposes, it is the recognition that it is the person who asserts ownership over some entity that must justify her claim to her fellow members of society; it is not those who reject assertions of ownership who have the burden of justification.

Vallier’s rejection of libertarianism highlights, and exemplifies, an important dearth of discussion in the public reason literature. He defines libertarianism in terms of two commitments, but wholly focuses on only one of them. He ignores, as does the vast majority of the public reason literature, the issues that arise if we focus on the extensiveness question. Libertarians are committed to ownership in a maximal set of items, but can this be justified? More generally, we can highlight another arena of disagreement: disagreement over what can be owned. And this is precisely the point of departure for most advocates of justice for animals. Their claim is that animals should not be owned, and if Vallier is right that the person claiming a realm of ownership is the initiator of coercion, then it is the person claiming ownership over animals who must justify such a regime to the animal advocates.

Although there is little in the public reason literature on the issue of what can be owned, there is some. Gaus, for instance, argues that a publicly justified property regime would permit private property in capital, something which some public reason liberals may balk at. But the
question of whether animals can be owned seems to be importantly different from the question of whether capital can be owned. Gaus takes as his antagonist a distributive justice-oriented liberal who suggests that the legitimacy of a property regime that permits the ownership of capital is dependent on the patterns of distribution which result. His antagonist is one who opposes the private ownership of capital because of its supposed effects on equality and resource distribution; the antagonist is not one who thinks capital, by its very nature, is something that should not be owned. But this is where the animal advocate is different, and the “what can be owned?” question becomes more interesting; for the animal advocate’s claim, much of the time, is that animals are, by their nature, something that should not be owned. More generally, we can note that the question of whether animals can be owned is fundamentally a question about the animals, whereas the question of whether capital can be owned is fundamentally about the effects on people.

So, the debate over animal ownership appears to be a different sort of disagreement than most public reason liberals have focused on. Both Gaus and Vallier suggest that a publicly justified private property regime will be strong qua extensiveness – permitting ownership over a wide variety of entities, including capital – but they do not consider disagreement over what can be owned that emphasizes something about the entity, rather than the effects on individuals in society. They advocate private ownership of “natural resources”, which for some includes animals, but do not consider that there is reasonable disagreement over what counts as a natural resource that can be owned. Thus, in much the same way that Rawls attempted to bypass the animal question by broadly sticking with a traditional understanding of the relation between

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232 Of course the questions may be related insofar as some think animals are capital. But that is beside the point for my current argument.
human and non-human animals, convergence liberals have largely implicitly relied on that understanding as well.

2. Property and Justice for Animals

Now that I have established an understanding of how property debates work within a public reason analysis, we can turn to the issue of animals as property. This issue is particularly important because a defining feature of the recent political turn in animal ethics is a rejection of the property status of animals. Moreover, by considering the philosophical arguments we can get an idea of the sorts of reasons and positions that would survive moderate idealization. This provides an initial idea of what sorts of defeaters members of the public may have for the property status of animals. After offering the survey of the philosophical positions, I will also go on to consider an important criticism of those positions which will help us to bring the arguments more in line with a public reason analysis of the issue.

2.1. Animals as Persons, not Property

Within all modern Western liberal democracies, domesticated animals are regarded as legal property. What this means, in brief, is that human owners are legally entitled to make authoritative decisions over their animal property, including confining the animal, restricting who can interact with the animal, selling or otherwise transferring the animal, and determining whether the animal’s life should continue. In public reason terms, the owned animal is within the human’s jurisdiction; her evaluative standards are authoritative regarding that animal. Now, importantly, modern liberal democracies do place some constraints on the authority of the owner
of some types of animals; anti-cruelty statutes limit an owner’s ability to treat the animal in certain ways. But this is not unusual when it comes to property law, as although I may choose to dispose of my smartphone, I may also be restricted in how I can dispose of it, due to e-waste restrictions. That how I can exercise my property right is limited does not detract from the fact that it is my right, and not somebody else’s, to choose if and when the phone should be disposed of.

That there are restrictions on one’s exercise of authority over an owned animal is not unusual. However, as I will discuss in more detail below, the justification for the restrictions may be unusual. Government restrictions on the disposal of smartphones may be straightforwardly justified by appeal to the harm to other (including future) humans that dumping electronic waste can have. But, it is not so clear that anti-cruelty laws and other related restrictions on an owner’s authority over an animal can be justified in the same way. While some have argued that anti-cruelty laws can be justified merely by appeal to human interests, in much the same way as restrictions on electronics disposal, Kimberly Smith has argued that such an approach fails to adequately make sense of the sorts of legitimate animal welfare laws common to modern liberal democracies. On her view, the best justification for such laws is that the protected animals are part of the “social contract,” and therefore society has a direct political obligation to protect their interests. This is because these laws restrict individual liberty, and in the classic social contract tradition, the only justifiable basis for restricting individual liberty is for the protection of the liberty of other members of the social contract. Appealing to the wrongness of unnecessary suffering (an alternative approach one may suggest) can only get a grip, politically, if the individuals who are unnecessarily suffering are members of the social contract. That just follows from the nature of social contract theory, which puts a premium on individual liberty.
Donaldson and Kymlicka similarly claim that domesticated animals are members of a mixed human-animal community, and that society can therefore act to protect their interests, even if doing so involves restricting human freedom. On these social membership approaches to justice for animals, the central claim that counts against the status of animals as property is that they, like humans, contribute to society. As members of society, then, their interests must be considered in designing social institutions; and once such interests are considered, it will turn out that ownership is unjust.

Importantly, and as explicitly noted by Smith, such an approach only works with domesticated animals. Wild animals, as well as what Donaldson and Kymlicka call “liminal animals” – those that live among us but are not part of our communities, such as squirrels and many birds – are not, properly speaking, part of our mixed community. Now, for Donaldson and Kymlicka, this is unproblematic – their group-differentiated citizenship model allows them to classify wild and liminal animals in such a way that they still cannot be owned. However, for Smith, wild and liminal animals are not a part of the social contract, and so any justification of their protections must appeal to human interests. This would imply, then, that ownership of wild or liminal animals is not (necessarily) unjust. 233

Other approaches eschew social contract-based reasoning about justice in favor of alternatives. Wyckoff, for instance, adopts an “interest-based condition for a theory of justice,” and so moves from the principle of equal consideration of interests to the claim that property in animals is unjust. On his view, the institution of property in animals systematically discounts the interests of animals, thereby violating the principle of equal consideration: This holds even if

233 Of course we may think that once an animal is owned, it is properly a part of our mixed community and so there is no just way to bring a wild animal under one’s ownership. Importantly, though, Smith – and most theorists – focus on domesticated animals and so we can set aside the issue of wild animals.
particular owners equally consider the interests of their particular animal property. Robert Garner similarly leans on animal interests to develop an interest-based account of enforceable rights. On his view, the rights of (at least some) animals are stringent enough that properly accounting for them would be incompatible with owning them.

Finally, it is worth discussing the “abolitionist approach” of Gary Francione (and others). Such a position is generally recognized as the most ‘radical’, by which I mean as departing most significantly from the status quo. For Francione, the status of animals as property presents a necessary obstacle to properly considering their moral and legal interests, and so must be abolished. Moreover, a just human-animal society involves a totally ‘hands-off’ approach, and would therefore not include domesticated animals at all. This support for ‘extinctionism’, whereby the transition to a fully just society would involve domesticated (sub-)species going extinct, and its concomitant absolute hands-off approach to human-animal relations is why the abolitionist approach is generally seen as most radical. Nonetheless, the basic strategy for rejecting property in animals is not uncommon, even if the further implications are. The claim is that, as a matter of fact, so long as animals are regarded as legal property it will never be possible to properly (that is, equally) consider their interests in the legal and political system. So, the argument similarly depends on something like the principle of equal consideration of interests, but makes a (non-contingent) empirical claim about how legal systems that regard animals as property violate that principle.

If we accept the above sorts of arguments as reasonable – as those that would survive moderate idealization – and accept their conclusions as stated, then it would appear that many members of society have defeaters for the property status of animals. But, in order to evaluate
whether this is true, we must further translate the arguments into public reason terms. To do so, it is worth focusing on three questions:

(i) What is the appropriate degree of individuation?
(ii) Do the moral arguments rise to the level of defeaters?
(iii) What is the appropriate response to defeaters in this case?

I will deal with each of these questions in turn. In brief, however, I will suggest that we must consider the property status of animals incident by incident, rather than as “property” or “not property”. Doing this will make clear that the arguments against property status really only rise to the level of defeaters for a few, albeit very important, incidents. And, since property rights are very early in the order of justification, accommodation is not possible. So when it comes to the defeated incidents, the appropriate response is elimination of the laws that grant those incidents.

2.2. Justice and Ownership: A Critique

The vast majority of the literature opposing the property status of animals treats property and ownership as all-or-nothing concepts. This is most obvious with Francione’s work, as indicated by the title of one of his articles: “Animals – Property or Persons?” There is the implicit, and sometimes explicit, assumption that there are only two possible legal statuses for any given entity and that all entities in either group are legally akin to every other entity in that same group. A “thing-ownership” conception of property tends to permeate the literature on the legal status of animals. And yet, as discussed earlier, that conception of property is misleading – it neither reflects the reality of property law nor is it supported by the sorts of arguments which support rights to private property generally.
Further, as Alasdair Cochrane has suggested, when we adopt the bundle theory of property, we seem to get a different view of the legal status of animals. In “Ownership and Justice for Animals”, Cochrane argues that justice for animals does not require abolishing ownership of them.\textsuperscript{234} By drawing on the bundle theory of property, he argues that many of the incidents of property are compatible with the moral status of animals as turn theorists understand that status, and that one could exercise those rights over animals while still granting them rights or considering their interests equally. In particular, Cochrane identifies the rights to possess, use, and transfer as central to the concept of ownership and claims that all three are compatible with fully respecting the moral status of non-human animals. If we translate his argument into public reason terms, Cochrane seems to be suggesting that whereas the rights of possession, use, and transfer are sub-optimal for animal advocates, they are not defeated.\textsuperscript{235}

Regardless of the success of Cochrane’s specific argument, it does highlight the need to think in a more fine-grained way about the legal status of animals. This is especially true when we consider his argument that the right to possess is not incompatible with the moral status of animals. For here, he claims that we do not object to the possession of children – we consider parents exercising the right to possess over their child as compatible with proper regard for the interests and rights of the child.\textsuperscript{236} Thus, even if we accept that human and non-human animals are equal, morally speaking, it is not obvious that we should be opposed to humans having the right to possess animals.

\textsuperscript{234} Cochrane, “Ownership and Justice for Animals.”
\textsuperscript{235} I am not here claiming Cochrane is correct, but merely spelling out his conclusion in terms relevant for my analysis.
\textsuperscript{236} Cochrane, “Ownership and Justice for Animals,” 435.
Cochrane’s analysis also highlights the fact, previously discussed, that some of the rights we exercise over objects we own we also exercise over entities that we do not own. We do not own our children, and yet we exercise (at least) the right to possess them. This would similarly be true of certain adults who, usually due to intellectual incapacity, are wards of someone else (or the state). That certain “property” rights are exercised over non-property has been used to show that Honoré’s account of property, where no particular incidents are necessary for ownership, is misguided.\textsuperscript{237} For if any set of incidents was sufficient for ownership, then we would own our children and any adult who is our ward. Although Cochrane recognizes this, he claims that the rights to possess, use, and transfer are jointly sufficient for ownership insofar as they sit at the core of our concept of ownership.

We should evaluate the legitimacy of the property status of animals by considering the various incidents of property individually. This contrasts with the “all-or-nothing” approach to property taken by most turn theorists and animal abolitionists. Evaluating the property status in this way might mean that certain incidents of property are justified while others are not. After establishing the contours of the relationship, our task will then be to determine whether the relationship is properly called ownership or something else. My view is that the closest legitimate legal relationship is properly called guardianship, not ownership, and so while some property incidents are justified, the status of animals as property is not.

\textsuperscript{237} Jaworski, “Me, Myself & Mine.”
3. Starting from Where We Are: Anti-Cruelty and the Interests of Animals

While it is correct that animals are currently regarded as legal property, it is not the case that animals are merely property. As has been recognized in various US court cases, animals occupy an unusual legal position. This is, most specifically, because of the presence of various laws that restrict what animal owners may do with or to their animal. And for the little that has been said about animals by public reason theorists, there is wide-ranging agreement that anti-cruelty and related laws are publicly justified.238 This is helpful, then, since it provides us a starting point in the status quo.

Anti-cruelty laws place restrictions on human freedom. Of course they restrict what people may do to animals generally, but what is most interesting is that they restrict what human owners may do with their animal property. Given the traditional liberal emphasis on individual liberty, it is not obvious how anti-cruelty laws can be justified. We traditionally justify other limits on individual liberty by the claim that exercises of that liberty interfere with the liberty of others, or more generally causes harm. But it should be obvious that an owner choosing to put cigarettes out on his dog has no effect on the liberty of other humans. Thus, if anti-cruelty laws are justified, they must be justified in some other way. Kimberly Smith suggests that such laws are justified because domesticated animals are part of the social contract – we can rightly limit human freedom if it causes harm to other animals, human or non-human.

By incorporating animals into the social contract, Smith is providing a theoretical basis for directly considering the interests of non-human animals. But it is the claim that animal interests matter that is central to anti-cruelty laws, regardless of whether these are justified by appeal to a social contract or some other theoretical apparatus. And that animal interests matter, legally speaking, is well accepted in anti-cruelty jurisprudence. As far back as 1888, in *Stephens v. State*, it was established that anti-cruelty laws were aimed at protecting the interests of the animal, not the interests of the owner or concerned citizens. And this understanding of the justification holds today, as with recent legislation in some states permitting concerned citizens to break into cars to free distressed animals. Here, even standard liability claims – for instance for the breaking of another’s car window – are overridden by concern for the interests of the animal.

If anti-cruelty laws are publicly justified, and their justification depends on accepting that animals have interests of their own, then that implies that everyone has reason to accept that animals have interests of their own. This establishes an important “fixed point” for thinking about the overall legal status of animals. While different people will assign different weight to the consideration of animal interests in their evaluative scheme, the recognition that animals have interests that can at least sometimes override human interests is shared by all moderately idealized members of society.

4. Property in Animals: A Public Reason Analysis

We are now in a position to analyze the property status of animals in public reason terms. In contrast to the claims made by many animal abolitionists, I will argue that certain property incidents – most notably the right to possess and the right to compensation – are not defeated,
and thus a public reason analysis does not eliminate all incidents of property. However, I do argue that the right to destroy and the power of transfer are unjustified. This will be important for the larger argument for animal guardianship since these incidents are central to an ownership relation but absent from a guardianship relation.

In offering the public reason analysis it is important to recall that it is those people asking for property rights who are the initiators of coercion. Even if their justification is that property rights are natural rights, what matters for a public reason analysis is that all members of the public have sufficient reason to endorse the coercion. Believing property rights are natural rights, or that God placed animals on Earth for human use, does not make a request for the legal protection any less coercive, and does not render such a request immune to the requirement of public justification.

4.1. A Vindication of the Right to Possess and the Right to Compensation

We can translate part of Cochrane’s argument, discussed above, to claim that animal advocates do not have defeaters for the right to possess, or what others refer to as the rights to use and exclude. This is because, as Cochrane notes, the right to possess is legitimately exercised over children, and so it is not obviously incompatible with a being having a high degree of moral status. Also consider the case of rescue sanctuaries, either for wild or domesticated animals. These sanctuaries may be temporary homes for injured animals, or long-term homes for animals that cannot be released into the wild. Regardless, those who run such facilities depend on various legal protections afforded them by way of (for instance) the right to possess. The sanctuary has a claim that others not interfere with its “use” of the animals and that others not interact with the animals absent consent. From this perspective, it should be quite obvious that an established right
to possess is preferable to no law or social norm governing use and exclusion. Thus, the right to possess is not unjustified. This is true whether we focus on a consequentialist comparison – does the right to possess lead to better consequences for the animals than no norm at all – or a deontic comparison – no norm at all does not better respect the moral status of animals than an established right to possess.

Similar reasoning also vindicates the right to compensation. If an animal sanctuary has the right to exclude people from accessing the animals, and yet someone accesses them anyway, then the sanctuary is due some sort of compensation. Now, at this point, one may suggest that a right to compensation is unjustified because it involves putting a price on the animal. This claim is, however, misleading. For tort law involves compensation for injuries caused, and so the price is put on the injury, not the person. Similarly, then, the claim to compensation made by an animal sanctuary would be a claim for the injury caused to it, by someone accessing the animal without consent. But even if this were incorrect, and a right to compensation implied putting a price on the animal, then it would not clearly be unjustified since we do the same thing in the human context and so it is not clear that putting a price on an animal, as a means of compensating for injuries at least, is incompatible with the animal’s moral status.

My analysis of the rights to possess and to compensation fit well with my claim in the previous chapter that there are far fewer defeaters to common policy than those who pose the anarchy objection suggest. There I made the general claim that to have a defeater one must rank an arrangement as worse than no arrangement at all, and so sub-optimal arrangements can still be justified. Here I have made the same claim in the context of specific arrangements. While it may be the case that the right to possess and the right to compensation are sub-optimal arrangements
for animal advocates, they are not thereby defeated. Following Cochrane, then, this is an important nuance that some of the turn theorists have failed to recognize.

4.2. The Illegitimacy of The Right to Destroy

Despite my vindication of certain property rights above, it is not the case that all current property incidences are justified. It is telling that in Cochrane’s defense of animal ownership the right to destroy or modify is not mentioned anywhere. While he identifies the rights to possess, use, and transfer as compatible with proper consideration of animal interests, he rightly (albeit implicitly) recognizes that the right to destroy is not so compatible. And this is particularly interesting in light of Kant’s view of property and ownership, in which the right (or liberty) to destroy is essential to ownership. If Kant, rather than Honoré, is correct about what is essential to the concept of ownership, then Cochrane is wrong that the sort of relationship he identifies is one of ownership.

The right to destroy is often understood as a liberty right – it suggests that the ‘owner’ is at liberty to destroy or modify the entity owned with no regard for the entity itself. Sure, there may be some restrictions on exactly how one may go about destroying what is owned, but this is a minor limit on an otherwise significant power. This power underwrites the current practices of removing the claws of cats (declawing), the vocal cord tissue of dogs (debarking), the horns of cattle (dehorning), the tails of pigs (tail docking), and the beaks and toes of chickens. These practices are carried out, for the most part, with little regard for the interests of the animals and

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239 The specific property incident usually encompasses the liberty to destroy, waste, or modify. For brevity, I will just refer to it as the ‘right to destroy’ but recognize it incorporates the liberty to waste and modify as well.

so it is not surprising that they are often the source of great suffering. Animals, especially those used in agriculture, are also killed at young ages – around 18 months for cattle, who could normally live for around 20 years.

It should be quite clear how the right to destroy an animal would run afoul of theories of justice for animals. It is nearly universally recognized that animals – at least the sorts of animals commonly owned and used – have an interest in not suffering; and yet the right to destroy and modify grants the liberty to kill or modify an animal without regard to the suffering that may cause. Also widely accepted among animal advocates, if not the general public, is that animals have an interest in continued existence or a right to life. Granting the liberty to someone to determine when and whether an animal will die requires denying that animals have this interest or right.

Importantly, the right to destroy or modify is tempered, in some cases, by other laws common to modern liberal societies. Humane slaughter laws require animals to be rendered unconscious prior to slaughter, while anti-cruelty statutes restrict how some modifications may be carried out for some animals. But these restrictions do not fundamentally eliminate the right to destroy or modify, and so, especially for those committed to the view that animals have an interest in continued existence, the current arrangement is deeply problematic.

The right to destroy is not merely deeply problematic for some members of the public, it is wholly unacceptable. On their view, to grant to another the liberty to determine when a being will die is to wholly deny that such a being has a right to life or an interest in continued existence. But, quite obviously, there is a reasonable case to be made that (many) animals have an interest in continued existence or a right to life. For those members of the public who accept
such a view, the claim to be protected in one’s decision to kill an animal is not simply sub-optimal, it is worse than no norm at all on the matter.

An established right to destroy settles a certain conflict that would remain if there were no norm on the matter at all. That conflict is over whether a human may determine, without consideration of the interests of the animal, whether it should continue to exist. Establishing a right to destroy establishes that it is socially and legally improper to interfere with an owner’s exercise of that liberty. So, from the perspective of an animal advocate, it would be better to not settle the issue and thus leave attempts to exercise control over the life of an animal open to challenge. In isolation, this means it would be permissible to attempt to stop the destruction. But in the larger context of justified anti-cruelty laws, and as I will detail more below, it opens up the possibility of the legal protection of animals against wanton destruction. But even absent that, while it may be true that eliminating the right to destroy would not eliminate all unjustified killing of animals, it provides the opportunity to challenge those killings.

But even if a comparison between no norm at all and the right to destroy indicated no difference in the number of animals killed, the right to destroy would still be unjustified. Indeed, in such a situation it may be even clearer that the right to destroy is unjustified. For if not having a legally protected right to destroy did not reduce anyone’s ability to kill animals as they saw fit, then there would be no reason, from their perspective, to impose additional coercion. But, from the perspective of many animal advocates, an authoritative recognition that humans (should) have control over animal lives is worse than no such authoritative recognition. Thus, whether

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241 Of course the means one may use to attempt the destruction may be limited in certain ways by other publicly justified norms.
eliminating the right to destroy would make any practical difference or not, animal advocates have defeaters for it.

The forgoing discussion indicates that sometimes members of the public may have strong deontic reasons to oppose a coercive social arrangement, even if that arrangement is identical, in terms of consequences, with having no arrangement at all on the matter. Often, convergence theorists focus on comparing various arrangements merely in terms of the consequences, but doing so runs afoul of the recognition of the fact of reasonable pluralism. Some people reject laws or policies not because they make any practical difference, but (for instance) because they express a certain view about some subject that they have reason to reject. Now, importantly, it must still be the case that the law or norm is coercive, but insofar as it is, then reasons to oppose the law or norm which are grounded in the expressive nature of the law or norm are relevant to its justification.

For all that has been said, a right to destroy may still be justified if it were importantly beneficial to various projects animal advocates may have. Recall, for instance, that one reason to doubt that the rights to possess and exclude were unjustified is that the very animal advocates who we thought may have defeaters actually depend on those rights in certain contexts – such as in establishing animal sanctuaries. Is there a similar situation with the right to destroy or modify? One may think so, since even animal advocates may sometimes have to kill an animal, and many animal advocates support spaying and neutering of (at least) cats and dogs. Doesn’t this suggest that they depend on the right to destroy or modify?

I think not. Obviously, if having a right to destroy or not made no practical difference, then certainly the sort of expressive, deontic reasons animal advocates have to oppose the right to destroy would carry the day. But let us assume that eliminating the right to destroy would make a
practical difference. Would it eliminate the ability to engage in the activities just discussed? Not obviously. For remember that the right to destroy is a liberty to act without consideration for the interests of the animal. When I choose to destroy my iPod, I do not have to consider whether the iPod wants to be destroyed. Similarly, when slaughterhouses kill cows and pigs, they are at liberty to do so without any consideration of the interests of the cows or pigs. But the sort of killing of animals that animal advocates would endorse involve cases of euthanasia – killing the animal for its own good. A similar story may explain spaying and neutering, although that is controversial. In these sorts of cases, the killing is done with consideration of the interests of the animal and thus does not depend on a liberty.

The right to destroy, waste, or modify animals is, therefore, unjustified in a diverse society. Some members of the public have decisive reason to prefer no established rule on killing animals to a rule that establishes a jurisdiction where a human is at liberty to decide whether an animal lives or dies or is modified or left for dead. This is, of course, all to say that these very same members of the public would also probably prefer rules that strongly protected animals’ interest in continued existence or right to life. However, that is irrelevant for the analysis, and since we can assume that other members of the public likely have defeaters for those strong protections, it is unlikely they would be justified in a diverse society.

4.3. The Illegitimacy of The Power of Transfer

The power of transfer is often considered central to property ownership. On Kant’s theory of ownership, it is the power of transfer and the right to destroy which define ownership. Similarly, Cochrane places the power of transfer alongside the rights to possess and use in the core of ownership. Cochrane also, as previously discussed, argues that the power of transfer is
compatible with justice for animals. In public reason terms, Cochrane has argued that the power of transfer over animals is justified. I reject this conclusion, and hold that the power of transfer, alongside the right to destroy, is unjustified in a diverse society.

The power of transfer is traditionally understood as a power to alienate through various means, such as sale or gift. For many animal advocates, the buying and selling of animals is objectionable because it involves putting a price on an animal life. Such advocates can be understood as extending Kant’s objection to the buying and selling of humans. For Kant, everything in the world has either a price or a dignity, but not both. He adds that “what has a price is such that something else can also be put in its place as its equivalent; by contrast, that which is elevated above all price, and admits of no equivalent, has a dignity.” Human beings, on Kant’s view, have a dignity, and so it is inappropriate to put a price on a human being. For many animal advocates, animals too have a dignity and are therefore above all price. Indeed, this extension of Kant’s theory is precisely what underwrites Tom Regan’s classic *The Case for Animal Rights*.

Even those who reject the notion of Kantian dignity altogether may still hold that there is a feature of (at least some) animals, including humans, which puts them “above price”. For instance, we may hold that all sentient beings, by virtue of their unique experiences, are irreplaceable and therefore above price. Similarly, we may hold that any being with a welfare is such that it is inappropriate to buy and sell it. All this is to say that there are a variety of

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242 This position is, of course, not universal. In fact, Kant’s discussion is illuminating for a controversy among animal ethicists. As he says, things with a price can be replaced by an equivalent, whereas things with a dignity cannot. Among animal ethicists there is debate over whether (some) animals are “replaceable” – that is, whether it is acceptable to kill them so long as they are replaced by an equivalently happy animal. Of course those who I suggest extend Kant’s conception of dignity to animals are opposed to replaceability.
reasonable avenues to the conclusion that animals are market-inalienable: they are not the sorts of entities that should be bought and sold.\textsuperscript{243}

Cochrane rejects this conclusion. On his view, those who reject the power of transfer are assuming that no entity can simultaneously be a commodity – a thing that can be bought and sold – and have its moral status properly recognized.\textsuperscript{244} But this assumption is false, he claims, for we have myriad examples of people both owning animals – which includes the power of transfer – and taking into account their interests.\textsuperscript{245} Furthermore, the presence of anti-cruelty legislation shows that we may simultaneously own animals and appropriately consider their interests.\textsuperscript{246}

It is actually Cochrane’s position that misunderstands the power of transfer, as well as other incidents of ownership. The core of his argument is that any given owner could wield their property rights over an animal in a way that is consistent with the interests of the animal. This is supposed to show that having, for instance, the power of transfer over an animal does not necessarily harm the animal. And this is correct as far as it goes, but it misses the fact that a property regime is a system, and those who oppose property in animals are opposed to the system of property in animals, not necessarily every single instance of exercising ownership over animals. As Jason Wyckoff suggests, “the systemic treatment of that individual as the kind of entity that can be possessed, used, and transferred constructs that entity and others like it... as an


\textsuperscript{244} Cochrane, “Ownership and Justice for Animals,” 429.

\textsuperscript{245} The idea that if something is a commodity, or market good, it cannot be properly respected, is what Jason Brennan and Peter Jaworski call a “semiotic objection”. They take on these sorts of objections in their recent book, arguing that so long as something can be given as a gift then there is nothing morally wrong with selling it. Of course, this raises the question, discussed later, about whether animals can permissibly be gifted. See Jason F. Brennan and Peter Jaworski, *Markets without Limits: Moral Virtues and Commercial Interests*, 1 edition (New York; London: Routledge, 2015).

\textsuperscript{246} Cochrane, “Ownership and Justice for Animals,” 430.
object… [which] subordinates the interests of [the animals] to those who benefit from the objectification of the individual.”

Wyckoff’s concern holds more weight when put into public reason terms. Recall that property rights are jurisdictions – they establish zones where the owner’s evaluative standards are authoritative. In the case of the power of transfer, the jurisdiction establishes that it is up to the owner to determine when, if, and how the animal is transferred. Now, any given animal owner may choose to exercise that power in a way consistent with the moral status of the animal. For instance, she may only choose to sell the animal if the new owner would provide a better life for the animal than the current owner. If so, then in this specific case, we could say that the exercise of the power of transfer is consistent with the animal’s moral status. However, Wyckoff is drawing our attention to the fact that what is problematic about the ownership of animals is that owners are not required to consider the interests of the animal. Whether the interests are considered is up to the owner – it is the owner whose evaluative standards are authoritative. And it is this which animal advocates have an objection to – on their view, it shouldn’t be a matter of mere preference whether the animal’s interests are taken into account. We would not accept such a situation for humans, and those who advocate for justice for animals are similarly claiming we should not accept such a situation for other animals.

The above analysis also explains why the objection to the power of transfer is a defeater for it as well. An established power of transfer affirms a common norm whereby the owner has ultimate authority over whether to transfer the animal. A lack of an established power of transfer

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248 One may suggest that if the right to destroy or modify is already unjustified then the power of transfer isn’t problematic. But we certainly don’t accept this analysis in the case of humans and the reason is probably that we recognize that permitting the transfer of humans has the chance of weakening compliance with norms against harm and abuse, even if such norms are still publicly justified.
– having no norm on the matter of animal transfers – simply leaves open whether the putative owner should have the final say in the matter. As with eliminating the right to destroy, this may make no practical difference and yet establishing the power of transfer signals that the interests of animals can be disregarded in making decisions about transfers. The establishing of this norm is worse than not establishing a norm on the matter at all, from the perspective of many animal advocates. And so, their opposition to the power of transfer indicates that it is unjustified, and not merely sub-optimal.

Now, at this point there may be two lingering doubts. The first is that for all I have said, there may be important practical reason for animal advocates to sometimes exercise the power of transfer over animals. The second is that my argument has almost exclusively focused on buying and selling animals, but there are other – non-market – methods of transferring property. For instance, one may gift property or have it allocated by some bureaucratic method.

Both of these doubts can be handled in the same way. Recall that the central concern for animal advocates is that the interests of animals are properly accounted for. As Cochrane suggests, one may in fact transfer (via the market or any other mechanism) an animal while properly considering its interests. What animal advocates object to, or at least what I suggest they should be objecting to, isn’t the transferal of animals but rather the power of transfer, understood as a jurisdiction. Even if animal advocates need the ability to transfer animals, their personal commitments commit them to considering the interests of the animal. Therefore, they do not need the jurisdiction that permits them to ignore the interests of the animal – they do not need the power of transfer. For example, individuals running a wildlife sanctuary may need to be able to transfer animals between different sanctuaries. But, assuming they are being consistent in their commitments, their determination to transfer must consider the interests of the animal. And
it does not matter if the transferal involves money or not, because the objection is to the jurisdiction as a whole.

5. Self-seekingness, animal interests, and guardianship

I have argued that two core incidents of animal ownership are unjustified: the right to destroy and the power of transfer. We can sum up the central objection in this way: humans should not be free to make certain determinations about animals under their authority without regard for the interests of the animals. For animal advocates, it is better to not have a common social norm which explicitly authorizes neglect of animal interests in those decisions than to have such a norm. This indicates that animal advocates do not have sufficient reason to endorse the current norms which authoritatively devolve judgments about animal lives to individual human jurisdictions, governed by the evaluative standards of those humans.

Another way to capture the argument is to suggest that the sort of ownership we are focused on, essentially defined by the right to destroy and the power of transfer, permits a “self-seekingness” which is objectionable when it comes to animals.249 This fits with the jurisdictional account of property rights, and the shared perspective of agency which justifies property rights generally. For on that account it was the fact that everyone has projects and pursuits which gave them strong reason to support a system of jurisdictions. The point of ownership, on this view, is to facilitate the achievement of one’s goals; the things one owns are instruments to the

achievement of various ends. But it is precisely this instrumentality, which is central to the jurisdictional understanding of property, which animal advocates object to. Animals, on their view, are not the sorts of entities which one should be permitted to dispose of “as one sees fit in the service of one’s ends.”

Some animal advocates have suggested that eliminating government protection of animal property, most notably the protection of corporations in the destruction of animals, would drastically improve the situation for animals. On their view, the wide-scale industrial level of destruction of animals depends on the legal protections afforded to corporations by state enforced property laws. If this is correct, then simply eliminating the unjustified elements of animal ownership is a significant step toward justice for animals. My analysis would thus show that at least partial justice for animals can be achieved in a diverse society; at least one aspect of justice for animals can overcome the public reason challenge.

However, it is not clear how simply eliminating the right to destroy and power of transfer would drastically change the current situation for animals. Perhaps it is true, as some of these theorists claim, that the rise of industrial agriculture can be partly attributed to various property protections, but now that industrial agriculture is here it is not clear that its persistence requires those same protections. That is why my argument did not essentially depend on the state of affairs with no norm at all being any different from the state of affairs with the right to destroy or the power of transfer. My claim was that even if it made no practical difference, the right to destroy and power of transfer would be unjustified.

But now I think we can say more. We can combine the elimination of the right to destroy and power of transfer with the presence of publicly justified anti-cruelty laws to carve out a new legal relationship between humans and animals: a legal guardianship relation.

5.1. Anti-cruelty and the Property Status of Animals

A common objection to property in animals is that so long as animals are property, any existing laws aimed at protecting the interests of animals will be broadly inefficacious. This is because the inevitable conflict that arises is between the interests of the animal and the rights of the owner. And since legal rights, especially basic jurisdictional rights, are supposed to be difficult to override, it is rare that the interests of an animal are sufficient to override them. And so, even when welfare protection laws apply, they are seldom enforced or enforced to any great degree.

The basic conflict can be seen clearly when we consider the sort of text common to anticruelty laws. Such laws often forbid “unnecessary” infliction of pain and suffering or “needless” mutilations and killing. But, in practice, what counts as “necessary” infliction of pain or a “needed” mutilation turns on whether the owner has an interest in inflicting the pain or mutilation. As a matter of course, cruelty is often limited to cases of wanton cruelty – the infliction of pain or the mutilation of an animal for no purpose other than entertainment. Just about any other interest the human owner may have in inflicting the pain or mutilating the animal, even if relatively trivial, can be sufficient to render anticruelty laws inapplicable. This

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252 E.g., Steven Wise, Rattling the Cage: Toward Legal Rights for Animals (San Val, 2001); and Francione, “Animals--Property or Persons?”
253 Schaffner, An Introduction to Animals and the Law, 26–27.
254 Francione, “Animals--Property or Persons?,” 117.
is most obvious with agricultural animals, where something being a “common practice” of the industry is sufficient to render it necessary or needed.\textsuperscript{256}

When we view property rights as jurisdictions basic to a liberal society, we can make sense of why anticruelty laws are so toothless. As previously discussed, property and other jurisdictional rights come early in the “order of justification” – they are foundational and largely form the backdrop for consideration of other political and legal issues. The rights established in this way will be difficult to override, since their value in economizing on collective justification would be diminished if they were regularly open to being overridden by the concerns of others. The point of property rights is that the judgment of the property owner is authoritative for us all (over what they legitimately own). So, a property rights regime encourages us to develop the norm of deferring judgment to the owner. When the owner is an owner of animals, then, we are primed to defer to the judgment of the owner regarding what should be done with the animal. If the owner declares that his actions were necessary, then that counts strongly in favor of those actions being necessary. The burden of proof needed to overturn such a determination is very high because the burden of proof needed to override property claims is very high.

This helps us understand why most turn theorists hold that the elimination of the property status of animals is a \textit{necessary} step toward justice for animals. So long as animals are regarded as property, their interests will be significantly discounted when they come into conflict with the rights of the owner. It will not be possible to consider the interests of animals equally, for instance, so long as the property status of animals sets such a high justificatory burden. And this is a mistake Cochrane makes when he claims that animals can simultaneously be owned and

\textsuperscript{256} Schaffner, \textit{An Introduction to Animals and the Law}, 52–53.
protected. For he points out the existence of animal protection laws alongside their current property status – albeit noting that existing laws may be insufficient – as evidence that there is nothing essentially blocking proper consideration of animal interests within a property paradigm. On the jurisdictional analysis, there is an essential block, because if animal protection laws were strong enough such that animal interests were appropriately considered, this would effectively eliminate the privileged status of the owner. Sure, we may still use the word ‘owner’ but such a person would not be in the privileged position of authority with regard to his “property”. He would not have the liberty to destroy or the power of transfer since his ability to do either would substantially turn on the interests of the animal. The “self-seekingness” inherent in ownership would disappear.

5.2. Legal Guardianship and the Interests of the Animal

One may exercise authority over something or someone without thereby being the owner. Recall that parental rights are effectively just certain property rights. Parents are in a privileged position of authority regarding their children, in comparison to other members of society. There is some deferral, among other members of society, to the judgments of the parent. But, importantly, we do not accept that children can be disposed of as one sees fit in the service of her ends. While it is not necessary for a parent to make decisions regarding a child without any consideration of the parent’s ends, we normally expect that parents will “limit their self-seekingness with respect to their children” – they will not make decisions for their children that ignore or discount the interests of the child.\(^{257}\)

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The parent-child relation is a paradigm of a guardianship relation. Guardianship is like ownership in that it is a legally recognized relation that places someone (or some entity) in a privileged position of authority over something or someone else. However, it is importantly distinct from ownership. For guardianship is inconsistent with certain property incidents, most notably the right to destroy and the power of transfer, and always involves an obligation, on the part of the guardian, to “act in the interests of” the ward that is guarded over.\textsuperscript{258} Full Ownership, on the other hand, at least requires the power of transfer (and, arguably, the right to destroy) and involves no obligation to act on behalf of the owned entity. It may involve other sorts of obligations – for instance to “inspect and make safe” – which are owed to third parties, but there is no obligation to act in the interests of the owned entity.\textsuperscript{259}

Anti-cruelty laws suggest that ‘owners’ have an obligation to “act in the interests of” the owned animal in much the same way that parents have an obligation to act in the interests of their child. One cannot neglect a child or a dog, for instance. Of course, as I have argued, such laws are largely rendered toothless since when they come into conflict with the rights of the owner. The obligation to act in the interest of the animal conflicts with the right to act as one pleases with regard to one’s property. But if the right to destroy and the power of transfer, which provide some of the gravest control over an animal, are eliminated, then the obligation to act in the interest of the animal is made more effective.

\textsuperscript{258} Jaworski, 94; See also David Favre, “Equitable Self-Ownership for Animals,” \textit{Duke Law Journal} 50, no. 2 (November 2000): 473, https://doi.org/10.2307/1373095 The relation Favre carves out is equivalent to what I am calling the guardianship relation, but he still prefers to call it ownership.

\textsuperscript{259} It may be the case that if the duties owed to third parties are sufficiently strong, then at some point the relationship ceases to be one of ownership – for the self-seekingness has been diminished too far – and instead becomes some other sort of authoritative relation such as stewardship.
By example, consider the following. Currently, various mutilation practices, common to animal agriculture, cannot be considered instances of animal cruelty. This is also true, to a lesser extent, with the killing practices in slaughterhouses. This is because the industry itself is permitted to define “standard practice,” and the law exempts any standard practices from cruelty, regardless of the amount of suffering they cause or the trivial interests they serve. Under a jurisdictional analysis of property, this makes sense – the industry, composed of animal owners, have the right to modify their property as they see fit. And since the bar to override property rights claims is set so high, the law simply defers to the evaluative standards of the owners. But, in a system which does not provide individuals the jurisdiction to determine whether an animal should be killed or mutilated, any given instance of killing or mutilation must account for the interests of the animal.

A legal guardianship relation, then, is what results if we simply test the status quo and eliminate a few key unjustified coercive social arrangements. We maintain that it is legitimate for humans to exercise some form of authority over animals, but we reject that such authority can be exercised without consideration of the interests of the animal. While there may be open questions about exactly what the interests of the animal are, and there may be reason to, on occasion, defer to the judgment of the guardian about what those interests are, this is not any different from the current parent-child relation. Parents are granted a significant amount of leeway in making their decisions, but this is because we assume they are properly accounting for the interests of the child. And when we have reason to believe they are not, then we are justified in stepping in. Similarly, then, animal guardians can be granted a significant amount of leeway, but since we know that a variety of common practices are not in the interests of animals, we would be justified in stepping in to eliminate those practices.
5.3. Guardianship and Justice for Animals

Animal guardianship, I have argued, is the closest publicly justified legal relationship to the status quo. This is not to say it is the only publicly justified legal relationship, nor that it is the best from the perspective of animal rights. But, it is a significant move toward justice for animals. And it is one that is imminently achievable insofar as all the legal mechanisms to establish animal guardianship are already in place. This is relatively obvious when we consider the parent-child relation, but we can also say more.

Consider, for instance, the distinction between equitable and legal title. If one has a legal title in some entity, then one is entitled to exercise the relevant property rights over that entity. If one has an equitable title, one may not exercise those rights, but is entitled to receive (usually financial) benefit from the exercise of rights, and must have one’s interest in the entity taken into account by the legal title holder. For many standard things we own, we have both the equitable and legal title. But, it is also common to separate these two components. For instance, if an estate is placed in trust, then the trustee is vested with the legal title in the estate while the beneficiary has the equitable title. This means, in part, that the trustee has certain property rights in the estate – for instance, she may have the power to sell the estate – while the beneficiary has others – for instance, she is entitled to the income from the sale. In this way, the division of title is simply a way of fragmenting property claims. But, there is a further element to this fragmentation, which is clear in the trust case: the person with legal title has an obligation to act in the interest of the person with equitable title. While the trustee may be able to execute a sale, she cannot do so simply for her own benefit at the expense of the beneficiary. In this way, while it is true that the trustee has some property interest in the estate, it would be incorrect to claim that the trustee
owns the estate. To be clear, this isn’t because the trustee is lacking the right to earn income from the sale, or any other particular incident, but because the scope of her authority is significantly constrained by her obligation to act in the interest of the beneficiary.

David Favre has argued that we can apply this legal distinction between equitable and legal title to establish legal guardianship for animals. The human guardian – formerly owner – maintains the legal title in the animal but transfers the equitable title, which she holds as owner, to the animal itself. The human would then be like the trustee while the animal the beneficiary. In this way, the legal system could quite easily make sense of a legal title holder having obligations to the entity she has title to.

Establishing the guardianship relation in this way seems to fit relatively well with many of the theories of justice for animals found in the political turn literature. Donaldson & Kymlicka, for instance, advocate for the citizenship of domestic animals, but recognize that such animal citizens will require humans to act on their behalf and otherwise wield certain authorities over them in their interests. Kimberly Smith similarly incorporates animals into a mixed social community, but accepts that many of an animal’s interests and rights will need to be advocated on their behalf, by representatives. And Robert Garner’s approach explicitly rejects the extinctionism of the abolitionist position, holding that there can be just human-animal relations if animals’ interests are properly accounted for. Indeed, other than (and perhaps including) the abolitionist approach, with its commitment to the inevitable elimination of domesticated animals,

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260 Favre, “Equitable Self-Ownership for Animals.”
261 The difference, of course, is that a trust is a 3-place relation between the property, the trustee, and the beneficiary whereas a guardianship relation is just 2-place between the equitable ward and the legal title holding guardian.
263 Smith, Governing Animals.
every approach to justice for animals accepts that justice for animals is compatible with their use by humans but that such use must be sensitive to their interests. Such theories, then, depend—often implicitly—on establishing a guardianship relation between humans and animals.

6. Conclusion

The Public Reason Challenge, as set out in chapter 1, has it that justice for animals cannot be legitimately achieved in a diverse liberal society since it depends. While theories of justice for animals may establish that we ought to, voluntarily, change our treatment of animals they are insufficient for grounding the use of coercive political power. The Public Reason Challenge, then, challenges the very idea of the political turn in animal ethics. And this is because, it was claimed, the sorts of reasons that justify an animal rights regime (or any other strong protections for animals) are not shared among all Members of the Public, and so policies based on those reasons could not be publicly justified.

The argument in this chapter is a culmination of a multi-part response to the public reason challenge to justice for animals. Previously I argued for a convergence, rather than consensus, approach to public reason liberalism. This blunted the concern that the reasons which underwrite animal rights policies are not shared by all. The convergence approach also encouraged us to think differently about justice for animals. Justice for animals is not only, and perhaps not even centrally, about introducing new, controversial norms and laws, which protect animals. Rather, what I have argued in this chapter is that an important part of justice for animals involves eliminating existing unjustified norms and laws. Justice for animals, in this way, is not merely about imposing new coercion but about eliminating coercion.
Thus, while it may be true that some elements of justice for animals cannot be
legitimately imposed on a diverse liberal society, it is not the case that we cannot make
significant moves in the direction of justice for animals within such a society. My position both
vindicates the use of political power in the aim of achieving justice for animals and vindicates
the appeal to the moral status of animals in discussions of political power. And so, in this way,
we can reconcile a commitment to liberalism, and public justification in particular, with a
commitment to animal rights and political justice for animals.


https://doi.org/10.1057/palgrave.cpt.9300070.


